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Supreme Court, U.S.

001102 JAN - 8 2001

No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

TAHIR M. BAWAZIR,

Petitioner,

v.

SHEIKH KHALID BIN MAHFOUZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process Clause permits a state to exercise jurisdiction over a nonresident defendant who directs his nonresident agent to conduct business in the forum state, when the agent asserts claims against the principal in the forum state for business activities he undertook for the principal's economic benefit in the forum state?

2. Whether the purposeful availment requirement under the Due Process Clause is satisfied when a nonresident plaintiff sues a nonresident defendant for claims that arise from a contract that has a substantial connection with the forum state, and is governed by the law of the forum state, even though the initial agreement between the parties is entered abroad?

3. Whether the purposeful availment requirement under the Due Process Clause may only be satisfied if a nonresident defendant solicits the initial contact for a business transaction in the forum state, notwithstanding that the nonresident defendant creates continuing obligations and had prior business dealings with the forum state from which he derived substantial economic benefit?

PARTIES TO THE PROCEEDING

Tahir M. Bawazir ("Bawazir") was a relator below and is a petitioner here. Sheikh Khalid Bin Mahfouz ("Sheikh Mahfouz") was a respondent below and is a respondent here. The Boeing Company ("Boeing") was a respondent below but is not a respondent in this Petition.[1]

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[1] Bawazir files this Petition with respect to the decision in favor of Sheikh Mahfouz that Washington State could not assert personal jurisdiction over him under the Due Process Clause. Bawazir does not seek review of the decision in favor of Boeing, although he believes that decision was also wrongly decided.

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OPINIONS BELOW

Petitioner seeks a Writ of Certiorari for review of the Washington State Court of Appeals' (Division I) decision (the "Washington State Decision") dated April 3, 2000, captioned *Tahir M. Bawazir v. The Boeing Company, Sheikh Khalid Bin Mahfouz,* No. 43375-0-1. On May 3, 2000, Petitioner filed a Petition for Review with the Washington State Supreme Court, captioned *Tahir M. Bawazir v. The Boeing Company, Sheikh Khalid Bin Mahfouz,* No. 69847-3. The Washington State Supreme Court denied the Petition for Review in an order dated October 11, 2000. The Washington State Supreme Court's order terminated this action in the Washington State courts.

This action originally commenced in Washington State Superior Court (King County), against Sheikh Mahfouz and Boeing, captioned *Tahir M. Bawazir v. The Boeing Company, Sheikh Khalid Bin Mahfouz,* No. 98-2-14646-0SEA. Both defendants moved for dismissal under Superior Court Civil Rule 12(b). In his motion, Sheikh Mahfouz disputed many facts alleged in the complaint, but provided no evidence or affidavits in support of his motion. On August 28, 1998, the trial court granted Sheikh Mahfouz's motion to dismiss but did not issue a written opinion in support of its decision.[2]

Copies of the Washington State Decision and related orders are included in the Appendix. None of these orders were published.

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[2] The trial court granted Boeing's motion to dismiss at the same time it dismissed the complaint against Sheikh Mahfouz.

JURISDICTIONAL STATEMENT

The Washington State Supreme Court's Order entered on October 11, 2000, constitutes a final judgment terminating the proceedings below. Accordingly, this Court has jurisdiction over the Petition. *See* 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The constitutional provision pertinent to this Petition is the Due Process Clause of the United States Constitution, Amendment XIV:

> No State shall make or enforce any law which shall . . . deprive any person of liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

A. Overview of the Case.

This Petition arises from the dismissal of a lawsuit filed by Bawazir against Sheikh Mahfouz, a Saudi national who has transacted substantial and continuing business in Washington. The trial court ruled it lacked personal jurisdiction over Sheikh Mahfouz, even though this lawsuit arises from a series of consulting agreements (collectively referred to as the "Agreements") Sheikh Mahfouz entered into with Boeing, which is headquartered in Seattle, Washington.

Pursuant to an oral agreement Bawazir entered into with Sheikh Mahfouz, Bawazir worked as Sheikh Mahfouz's managing agent under the Agreements for six years, assisting Sheikh Mahfouz and Boeing in their sale of airplanes manufactured in Washington State to Saudia

Airlines, the national air carrier of Saudi Arabia. Bawazir's claims arise out of commissions that were to have been paid under the Agreements pursuant to the oral agreement between him and Sheikh Mahfouz.

Sheikh Mahfouz will receive millions of dollars in commissions from Boeing under the Agreements. Payments are to be made from Boeing's Washington State headquarters as aircraft are delivered to Saudia Airlines, and future commission payments remain forthcoming. Bawazir seeks a fair share of the commissions Sheikh Mahfouz promised to pay him for services he rendered as Sheikh Mahfouz's managing agent under the Agreements.

Sheikh Mahfouz directed and controlled Bawazir to work as his managing agent under the Agreements. Bawazir performed substantial services as Sheikh Mahfouz's managing agent, including making many visits on his behalf to Boeing's headquarters in Washington State. In addition, Sheikh Mahfouz corresponded regularly with Boeing representatives in Washington State, renewed his annual consulting relationship with Boeing for six successive years, and traveled to Boeing's headquarters in Washington State for an important meeting to address financing issues that threatened to terminate the transaction.

Eventually, Boeing won a $5.2 billion airplane contract with Saudia Airlines. Boeing's airplane contract with Saudia Airlines was so important to Washington State and the U.S. economy that President Clinton announced the sale at a White House ceremony with Washington State's congressional delegation at his side.

This dispute arose after Boeing issued a multi-million dollar commission check to Bawazir. Bawazir deposited the funds in a special bank account opened by him in Sheikh Mahfouz's name, pursuant to an understanding with Sheikh Mahfouz that the commissions would be shared. Sheikh Mahfouz then abruptly terminated his relationship with Bawazir and instructed Boeing to stop issuing further commission payments to Bawazir. Subsequently, Boeing and Sheikh Mahfouz disavowed any obligation to compensate Bawazir for his extensive work on behalf of Sheikh Mahfouz.

Petitioner seeks relief from this Court because the Washington State Decision weakens the extraterritorial reach of the Due Process Clause over foreign persons conducting business with a forum state. The Washington State Decision raises important questions of constitutional law about whether foreign persons deriving substantial economic benefit from conducting international commerce in a forum state satisfy the purposeful availment requirement under the Due Process Clause. Furthermore, the Washington State Decision curtails the expanding reach of the Due Process Clause in this age of increasing international transactions, and will have a chilling effect on international commerce.

Finally, the Washington State Decision highlights a conflict among the lower courts as to whether (i) an agent may impute his activities in the forum state to assert that state's jurisdiction over litigation against the principal, and (ii) whether solicitation of business in the forum state is a prerequisite to satisfy the purposeful availment requirement under the Due Process Clause. The Washington State Decision also conflicts with this Court's precedent that when a claim arises from a contract which has a substantial connection with the forum state, the Due Process Clause is satisfied and permits resulting litigation in that state.

As the law currently stands, nonresidents may be subject to the jurisdiction of some states, but not others, for the same conduct because a conflict among the lower courts exists as to when the purposeful availment requirement under the Due Process Clause is satisfied. Review is necessary to resolve these conflicts in the law and to ensure that foreign individuals do not abuse the economic benefits they derive from engaging in business in a forum state by using their international status as a shield to avoid their in-state obligations. Review is also necessary because Washington State is the only practical forum in which Bawazir can obtain relief against Sheikh Mahfouz.

B. Sheikh Mahfouz Transacted Substantial and Continuous Business in Washington State.

1. Sheikh Mahfouz Transacted Business Unrelated to This Litigation.

Sheikh Mahfouz is no stranger to Boeing, Washington State, or the United States. Boeing employed him in the 1980s to assist in the sale of Boeing aircraft in Saudi Arabia. CP 678-79 ¶ 17.[3] His family maintained a residence in Washington State, and he is believed to own several businesses in Washington State. Appendix 62a ¶¶ 7-8.[4] He also has an ongoing business relationship with Boeing for the operation of his two personal Boeing aircraft, and for decades has conducted business with The Frank Russell Company, which is headquartered in Tacoma, Washington. CP 676-77.

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[3] Clerk's Papers filed with the Washington State Court of Appeals under seal pursuant to a protective order are referenced as "CP" in this Petition. Bawazir has filed a motion with this Court to lodge these Clerk's Papers under seal.

[4] In separate proceedings, the United States Government attached Sheikh Mahfouz's U.S. assets in connection with the notorious *BCCI* litigation, which facially appear to include the names of Washington entities under his control. Appendix 62a ¶ 6; 64a-69a.

2. Sheikh Mahfouz Transacted Business in Washington State Pursuant to His Consulting Relationship with Boeing.

For six years Sheikh Mahfouz and Bawazir worked with Boeing to compete against Airbus and McDonnell Douglas for an airplane contract with Saudia Airlines. Appendix 33a-39a. Their resulting contacts centered on business activities in Washington State, where Boeing's headquarters are located and its airplanes are manufactured.

Initially, Boeing approached Sheikh Mahfouz about entering into a consulting relationship for the sale of Boeing aircraft to Saudia Airlines. Appendix 35a ¶ 11. Bawazir and Sheikh Mahfouz formed a joint venture to pursue the consulting relationship with Boeing, and Sheikh Mahfouz agreed Bawazir would be the managing agent of the joint venture. Appendix 43a, 58a-59a ¶ ¶ 36, 122-125. Subsequently, Sheikh Mahfouz asked Bawazir to meet with Boeing on his behalf to pursue discussions about the consulting relationship because they were one of several teams "vying" to be hired. Appendix 36a ¶ 15. Sheikh Mahfouz also solicited George Russell, Chairman and CEO of The Frank Russell Company, to be a reference for his Boeing consultant application. *Id.*

In 1992, Sheikh Mahfouz entered into the first of a series of consulting Agreements with Boeing. Appendix 36a-37a ¶ 16. Sheikh Mahfouz renewed the Agreements annually in 1993, 1994, 1995, and 1996. Appendix 47a ¶¶48-49. The Agreements were governed by Washington law. Appendix 37a ¶19.

Boeing's sale of aircraft to Saudia Airlines was contingent on financing. Appendix 46a, 47a ¶¶43-44, 46; CP 681 ¶¶27-28. To help secure Boeing's airplane contract with Saudia Airlines (and the resulting commission payments), Sheikh Mahfouz and Bawazir visited Seattle in May 1994 to meet with Boeing Chairman Frank Shrontz and others at Boeing's headquarters. CP 680-81 ¶¶24-28. Financing issues that threatened the sale of Boeing aircraft to Saudia Airlines were ultimately resolved. Appendix 48a ¶50.

3. Bawazir Worked as Sheikh Mahfouz's Agent for Six Years Under the Agreements.

Boeing and Sheikh Mahfouz understood that "Bawazir would be a significant participant in a venture with Sheikh Mahfouz" under the Agreements. Appendix 36a-37a ¶16. Bawazir initialed each page of the Agreements and is referred to as a "key person" and "principal" in the Agreements.[5] Appendix 37a, 41a ¶¶17, 30. Bawazir was Sheikh Mahfouz's managing agent in Washington State during this six-year period. Appendix 43a, 58a-59a ¶¶36, 122-125.

Bawazir and Sheikh Mahfouz each understood they were to be paid only if Boeing won the contract to sell its airplanes to Saudia Airlines. Appendix 37a ¶18.[6] Sheikh Mahfouz assured Bawazir orally he would "be entitled to share" the commissions paid by *Boeing.* Appendix 43a ¶ 35. Culturally, such oral agreements in Saudi Arabia are common, and the sharing of profits between Sheikh Mahfouz and Bawazir as business partners was an established practice between them in their prior business ventures. Appendix 36a ¶ 14.

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[5] The Agreements define "principal" to mean acting as a "representative" of Sheikh Mahfouz. CP 720.

[6] The total contingent fee is calculated as a percentage of the value of aircraft delivered to Saudia Airlines. CP 815 ¶5.1.

Bawazir's work as Sheikh Mahfouz's managing agent under the Agreements included:

- Attending many business meetings with Boeing representatives in Seattle;
- Corresponding with Boeing representatives for six years in Seattle;
- Communicating by telephone several hours per week with Boeing management in Seattle;
- Working with Boeing representatives in Seattle to prepare documents about the terms and conditions of the sale of aircraft built in Washington State to Saudia Airlines;
- Providing information to Boeing representatitives in Seattle about competing proposals from Airbus and McDonnell Douglas;
- Assisting Boeing representatives in Seattle in preparing correspondence and communications to Saudi Royal officials; and
- Signing letters addressed to Saudi Arabia's King that outlined the terms of Boeing's contract offer to Saudia.

CP 677-78; Appendix 40a, 41a, 43a. Bawazir devoted 40-50 percent of his time each year to Boeing's sales efforts. Appendix 40a-41a ¶ 29.

Bawazir's central role as an agent of Sheikh Mahfouz under the Agreements was further highlighted by two *events. First, in 1992 the U.S.* government indicted Sheikh Mahfouz for criminal fraud in the Bank of Commerce and Credit International ("BCCI") scandal.[7] Second, in 1993 certain members of the Saudi Royal Family sought to have Boeing cancel the Agreements in favor of someone with closer ties to the Royal Family. Appendix 41a-43a.[8] These events required Sheikh Mahfouz and Boeing to rely even more heavily on Bawazir to perform services under the Agreements, and Bawazir made several visits to Boeing's Washington State headquarters during this period. Appendix 40a, 44a; CP 677 ¶ 14.

C. Sheikh Mahfouz Reaped the Benefits of Conducting Business in Washington State but Seeks to Avoid His Resulting Legal Obligations.

In October 1995, Boeing secured a $5.2 billion airplane contract with Saudia Airlines. Appendix 48a ¶ 50. The contract was so important President Clinton announced the sale at a White House ceremoney with Washington State's congressional delegation and Boeing's then-current Chairman, Frank Shrontz, attending.

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[7] On July 1, 1992, a New York Grand Jury issued an indictment against Sheikh Mahfouz and a warrant for his arrest because of his BCCI activities. Until Sheikh Mahfouz settled the charges with U.S. authorities in December 1993, Boeing and Sheikh Mahfouz relied almost exclusively on Bawazir to perform work under the Agreements. Appendix 39a-40a.

[8] Bawazir and Boeing implemented a strategy to resolve this issue and not cancel the Agreements. Sheikh Mahfouz subsequently renewed the Agreements upon their expiration in 1994, 1995, and 1996 after Bawazir "reiterated his understanding" the commission payments would be shared if Boeing was successful in selling airplanes to Saudia Airlines. Appendix 43a, 47a ¶¶ 35, 48.

Appendix 45a-46a ¶42.[9] Boeing Chairman Frank Shrontz personally thanked Bawazir for his role in Boeing's success in winning the airplane contract with Saudia Airlines. Shrontz wrote:

> Throughout the Saudia campaign, Bob consistently reported to me *how helpful you were in all phases leading up to the signature of the contract.*

Appendix 48a ¶52 (emphasis added).

In August 1997, Boeing issued a multi-million dollar commission check to "Mr. Tahir M. Bawazir." Appendix 48a-49a ¶54; CP 684 ¶38.[10] Sheikh Mahfouz then instructed Boeing in a letter addressed to its "Chairman" that "all future commission checks be made directly payable to me." Appendix 49a ¶55. As a result, Sheikh Mahfouz will receive millions in commission payments for work performed by Bawazir, but Bawazir will receive nothing in return because Sheikh Mahfouz refuses to pay Bawazir anything – despite Bawazir's six years of work as Sheikh Mahfouz's managing agent under the Agreements.[11]

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[9] President Clinton stated "This deal will support tens of thousands of jobs not only in California and Washington, where the planes will be built, but in Missouri, Kansas, Arkansas, Utah, and elsewhere, where Boeing and McDonnell Douglas have extensive operations." *Id.*

[10] Bawazir deposited the funds in a Special Project Account opened by him in Sheikh Mahfouz's name, with the understanding Sheikh Mahfouz would distribute from this account a share of the commission payments to Bawazir. Appendix 48a-50a ¶¶53-60. Sheikh Mahfouz never paid Bawazir.

[11] Bawazir asserted breach of contract, third-party beneficiary, unjust enrichment, restitution and quantum merit claims against Sheikh Mahfouz but the trial court and appellate court did not address the merits of Bawazir's claims. Appendix 51a-58a.

D. Bawazir Cannot Obtain Legal Redress in Saudi Arabia.

Bawazir will be deprived of legal redress if forced to pursue his claims against Sheikh Mahfouz in Saudi Arabia. The unpaid commission funds, critical witnesses, and significant documentary evidence are all located in Washington State. The majority of witnesses identified by Bawazir are Boeing employees who cannot testify, or be subject to compulsory process, if this lawsuit is prosecuted in Saudi Arabia.[12] Consequently, Bawazir will not have access to the evidence he needs to prove his claims in a Saudi forum.

REASONS FOR GRANTING THE WRIT

A. The Petition Raises an Important Federal Question About the Extraterritorial Reach of the Due Process Clause When Foreign Persons Conduct Substantial International Commerce with a Forum State.

Washington State courts may exercise jurisdiction over nonresident defendants to the full extent permitted by the Due Processs Clause of the U.S. Constitution. *Shute v. Carnival Cruise Lines,* 113 Wn.2d 763, 771, 783 P.2d 78 (1989), *rev'd on other grounds,* 449 U.S. 807 (1990). This Petition raises important questions of constitutional law as to whether a state may assert personal jurisdiction over a nonresident conducting international commerce with the forum "consistent with due process." *Burnham v. Superior Court of California,* 495 U.S. 604, 609 (1990).

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[12] Only Muslims may testify in Saudi courts. *See* D. Karl, *Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know,* 25 Geo. Wash. J. Int'l L. & Econ. 131, 151 (1992) (Saudi courts "require that all witnesses be Muslims"). Further, Saudi Arabian law does not provide for pretrial discovery or other procedures that would ensure Bawazir has access to Boeing records maintained in Seattle, Washington. *Id.* at 150.

This Court may review de novo the Washington State Decision dismissing the claims for lack of personal jurisdiction. *See World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 291-92 (1980). The pleadings and affidavits should be considered "in the light most favorable to the party opposing the motion." *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico,* 457 U.S. 853, 863 (1982).

B. Supreme Court Review Is Necessary to Address an Unsettled Question Under the Due Process Clause: Whether a Nonresident Principal Who Directs His Nonresident Agent to Conduct Business in a Forum Purposefully Avails Himself to the Jurisdiction of the Forum State When the Agent Is the Plaintiff.

1. Review Is Necessary to Resolve an Irreconcilable Conflict Among the Lower Courts.

Washington State's long-arm statute explicitly subjects any person "who in person or *through an agent*" transacts business in Washington State to its jurisdiction. RCW 4.28.185 (emphasis added). There is no dispute that Bawazir acted "as Mahfouz's agent" in Washington State under the Agreements. Appendix 24a. Rather, the only dispute is whether Bawazir's conduct may "be imputed to Mahfouz to satisfy the purposeful act requirement" under the Due Process Clause. *Id.* An irreconcilable conflict among the lower courts exists as to whether jurisdiction may be asserted over a foreign defendant when the acts of his agent would otherwise clearly satisfy the jurisdictional nexus required to meet the minimum due process requirements under the Constitution.

Numerous courts have ruled that an agent may sue his nonresident principal in connection with a lawsuit arising out of the agent's activity in the forum state.[13]

Other courts have adopted a much narrower rule, like Washington State, which permits everybody *but* the agent to sue the principal for activities conducted by the agent in the forum on the principal's behalf.[14]

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[13] *See, e.g., Chan. v. Soc'y Expeditions, Inc.*, 39 F.3d 1398, 1405-06 (9th Cir. 1994) (activities by agent in forum sufficient to confer jurisdiction); *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1215 (7th Cir. 1984) (jurisdiction sufficient on the basis of defendant corporation's agent's activities in the forum state); *Snyder v. Hampton Industries, Inc.*, 521 F. Supp. 130, 146 (D. Md. 1981) (jurisdiction asserted over nonresident defendant when plaintiff, a sales agent of defendant, sought commissions owed for work performed in the forum state); *Terry, Inc. v. Sales Service Mach. Tool Co.*, 414 N.W.2d 568, 572 (Minn. Ct. App. 1988) (jurisdiction asserted over nonresident defendant because plaintiff's activities as a sales agent of the nonresident within the forum state sufficient under the Due Process Clause); *Rose v. Silver*, 394 A.2d 1368, 1372 (D.C. 1978) (jurisdiction asserted over nonresident when plaintiff, a lawyer for defendant, sought fees for work performed in the forum state); *Zerbel v. H.L. Federman & Co.*, 179 N.W.2d 872, 877 (Wis. 1970) (jurisdiction asserted over nonresident defendant when plaintiff performed services for defendant in the forum state).

[14] *See, e.g., New World Capital Corp. v. Poole Truck Line, Inc.*, 612 F. Supp. 166, 172 (S.D.N.Y. 1985) (an agent cannot impute his activities in the forum state to assert jurisdiction over the principal); *Metropolitan Air Serv., Inc. v. Penberthy Aircraft Leasing Co.*, 648 F. Supp. 1153, 1157 (S.D.N.Y. 1986) (following

[footnote continued]

The lower courts' contradictory interpretation of the Due Process Clause in this context cannot be reconciled. Review is necessary to resolve the resulting confusion and uncertainty over whether nonresidents engaged in international commerce may be subject to the jurisdiction of some states, but not others, for the same conduct. It will also promote uniform decisions among states, like Washington State, that exercise jurisdiction to the full extent permitted under the Due Process Clause.

Establishing a consistent rule when persons subject themselves to the jurisdiction of a forum state is critical to U.S. international trade because "[e]nhancing legal certainty for international sales contracts will serve the interests of all parties engaged in commerce by facilitating international trade."[15] The absence of a consistent jurisdictional rule will have a detrimental impact on U.S. international trade.

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the "Haar" rule about not imputing an agent's activities in the forum state to assert jurisdiction over the principal but criticizing the rule); *Zavian v. Foudy*, 747 A.2d 764, 770 (Md. Ct. Spec. App. 2000) (agent cannot attribute its activities in forum for the purposes of establishing jurisdiction over the nonresident defendant); *Haar v. Armendaris Corp.*, 31 N.Y.2d 1040 (N.Y. 1973) (an agent cannot attribute its activities to the principal for purposes of asserting jurisdiction).

[15] *See* Ronald Reagan, A Letter of Transmittal to the Senate of the United States, on the Subject of the United Nations Convention on Contracts for the International Sale of Goods (1983), *reprinted in The Convention for the International Sale of Goods: A Handbook of Basic Materials*, at 71 (Reid R. Kathrein and Daniel Barstow Magraw eds., American Bar Assoc. Sect. of Int'l Law 1987); *see also International Sale of Goods, 1984, Hearing Before the Comm. of Foreign Relations*, 98th Cong. 1 (1984) ("International traders need a consistent and understandable set of rules to govern their transactions").

2. The Washington State Decision Raises a Novel Question About the Scope of the Due Process Clause When the Agent Is the Plaintiff.

The Washington State Court of Appeals adopted an extremely narrow and controversial rule that "where an agent sues his principal, he cannot impute his own acts in the forum as a basis for obtaining jurisdiction over the non-domiciliary principal." Appendix 24a.[16] This unsettled issue has been rejected by other courts and never addressed by this Court. Moreover, Washington State's unduly narrow construction of the Due Process Clause contravenes the "inevitable relaxation of the strict limits on state jurisdiction over nonresident individuals." *Burnham v. Superior Court of California,* 495 U.S. 604, 617 (1990).

This holding insulates nonresidents from obligations to their agents, even when they direct their agents to engage in activities where the nonresident is sued. *Cf. International Shoe Co. v. Washington,* 326 U.S. 310, 313 (1945) (nonresident corporation subject to jurisdiction because it directed the activities of its salespeople in the forum state).

The Washington State rule is also illogical. On the one hand, it permits *other parties* to sue a nonresident based on the activities of the nonresident's agent. For example, Sheikh Mahfouz could be subject to Washington State's jurisdiction in a dispute with Boeing, or if Bawazir had injured a third-party in an automobile accident in Washington State. On the other hand, the Washington State rule precludes the agent from suing the principal for the *same activities* that have conferred jurisdiction over the nonresident in any other context.

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[16] The Washington State Court of Appeals cited *New World Capital Corp. v. Poole Truck Line, Inc.,* 612 F. Supp. 166, 172 (S.D.N.Y. 1985) and *Caballero Spanish Media, Inc. v. Betacom, Inc.,* 592 F. Supp. 1093, 1095-96 (S.D.N.Y. 1984) in support of its holding. Appendix 24a.

This asymmetry creates a paradox: a nonresident has purposefully subjected himself to the jurisdiction of the state based on the activities of his agent, *except* if his agent is the plaintiff. In other words, jurisdiction rests solely upon *who the plaintiff is in the lawsuit,* not whether the *defendant* purposefully availed himself by directing his agent to conduct business in the forum state. This cannot be the law. This Court long ago dispensed with the notion that jurisdiction is somehow dependent upon the identity of the plaintiff. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984) (the proper focus is on the "relationship among the *defendant,* the forum, and the litigation") (emphasis added) (citations omitted).

This Court should grant review to settle this issue and correct the Washington State Court of Appeals' holding, which improperly places the focus on the plaintiff, not the defendant, in determining whether the purposeful availment requirement under the Due Process Clause is satisfied.

C. The Washington State Decision Conflicts with This Court's Precedent, Which Holds That When a Claim Arises from a Contract That Has a Substantial Connection with the Forum State, The Purposeful Availment Requirement Under The Due Process Clause Is Satisfied.

The Washington State Court of Appeals conceded that Bawazir's claims against Sheikh Mahfouz "rest primarily on the Agreement between Mahfouz and Boeing." Appendix 22a. However, the court then ruled "that agreement is *irrelevant* in determining whether personal jurisdiction over Mahfouz exists in an action brought by Bawazir." *Id.* (emphasis added). Rather, the Washington State Court of Appeals ruled purposeful availment could only be established with respect to the oral agreement entered into between Bawazir and Sheikh Mahfouz, and purposeful availment could not be established because that oral agreement occurred abroad. Appendix 21a-22a.

The Washington State Court of Appeals improperly segregated one agreement from the other. Sheikh Mahfouz's agreement with Bawazir would not exist but for the Agreements he entered into with Boeing. Indeed, Boeing acknowledged "*Bawazir's claims are based on the Agreement.*" Appendix 71a-72a n.2 (emphasis added). The Washington State Decision thus conflicts with this Court's ruling that specific jurisdiction may be asserted over a nonresident defendant if the suit "arise[s] out of or relate[s] to" defendant's activities with the forum. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472 (1985).

Further, the Washington State Decision ignores the underpinnings of Bawazir's claim: a fair share of the commissions owed and to be paid under the Agreements. In fact, after Boeing issued a multi-million dollar commission check to Bawazir, Sheikh Mahfouz instructed Boeing by a letter addressed to its "Chairman" to stop issuing commission payments to Bawazir. Appendix 49a ¶55. This was an act of purposeful availment which inextricably connects Sheikh Mahfouz (and Bawazir's claims) to Washington State. Sheikh Mahfouz's relationship with Washington State "can in no sense be viewed as 'random,' 'fortuitous,' or 'attenuated.' " *Burger King* at 480.[17]

So long as Sheikh Mahfouz "purposefully derive[d] benefit" from his interstate activites with Washington State, he should not be allowed to avoid the "consequences that arise proximately from such activities." *Burger King*, 471 U.S. at 473-74. The fact that Bawazir and Sheikh Mahfouz entered into an oral agreement abroad does not negate Sheikh Mahfouz's purposeful availment with Washington State because the claims arise from commissions paid under the Agreements pursuant to an oral agreement to be performed, in large part, in

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[17] *See also Afram Export Corp. v. Metallurgiki Halpys, S.A.*, 772 F.2d 1358, 1361-64 (7th Cir. 1985) (Posner, J.) (five-hour visit in the forum by the Greek defendant's independent agent sufficient to satisfy the purposeful availment requirement even though the contract was formed by an exchange of trans-Atlantic telexes because the state provided "police and fire protection" to the agent and the dispute arose from the contract). Sheikh Mahfouz not only received fire and police protection when he visited Boeing's headquarters to resolve financing issues, he was required to pay fees for landing his aircraft at Boeing Field. King County Code 15.60.010 ("No person shall allow any aircraft owned by him or under his control to land, take off, use B.F.I. [Boeing Field] facilities" without paying "all applicable landing, tie-down or other fees").

Washington State.[18] *See* CP 677-78; Appendix 40a, 41a, 44a ¶¶ 27, 29, 37.

The Washington State Decision cannot be reconciled with this Court's finding that purposeful availment under the Due Process Clause may be satisfied so long as "the suit was based on a contract [i.e., the Boeing Agreements] which had a substantial connection" with the forum state. *See McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957). This Court should grant this Petition, in part, because the Washington State Decision threatens to erode the legitimate and "expanding reach" of the Due Process Clause by insulating contracts formed abroad, even though the underlying agreement giving rise to the claims is inextricably linked to the forum state.

D. The Washington State Decision Crafts an Unduly Narrow Rule Never Decided by This Court by Requiring a Nonresident to "Solicit" Contacts with the Forum State To Satisfy the Purposeful Availment Requirement Under the Due Process Clause.

The Washington Court of Appeals found "persuasive" that Sheikh Mahfouz did not satisfy the purposeful availment requirement under the Due Process Clause because he did not "solicit[ ]" to become Boeing's consultant. Appendix 23a. Under this rule, nonresidents must "solicit" the initial contacts with the forum state to satisfy the purposeful availment requirement under the Due Process Clause, regardless of any other purposeful contacts a nonresident may have with the forum state.

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[18] *See also CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1267 (6th Cir. 1996) ("if a defendant's contacts with the forum state are related to the operative facts of the controversy, then an action will be deemed to have arisen from those contacts"); *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209 (7th Cir. 1984) (purposeful availment requirement satisfied, even though nonresident plaintiff never negotiated contract with nonresident defendant in the forum state, because the claim "lies in wake" of the nonresident's commercial activities in the forum state).

This Court has never required that a nonresident defendant initiate or solicit contacts with the forum state to satisfy the purposeful availment requirement under the Due Process Clause. Rather, parties who " '*create continuing relationships and obligations* with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." *Burger King,* 471 U.S. at 473 (emphasis added).

Other courts have ruled that the failure to initiate or solicit business contacts with the forum does not vitiate the purposeful availment requirement under the Due Process Clause so long as the defendant enters into continuing obligations with the forum.[19] These rulings conflict with other lower courts, like Washington State, which have denied jurisdiction when the nonresident did not initiate contacts with the forum state.[20]

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[19] *See, e.g., Logan Prods., Inc. v. Optibase, Inc.,* 103 F.3d 49, 53 (7th Cir. 1996) ("the constitutionality of jurisdiction does not turn on which party 'started it' "); *Roth v. Garcia Marquez,* 942 F.2d 617, 622 (9th Cir. 1991) (fact that plaintiff "initiated" business contacts with nonresident defendant did not vitiate defendant's purposeful availment when the "contract's subject would have a continuing and extensive involvement with the forum"); *Electro-Craft Corp. v. Maxwell Elecs. Corp.,* 417 F.2d 365, 369 (8th Cir. 1969) (although defendant did not initiate negotiations it "actively and voluntarily participated in them thereafter"); *Viking Eng'g. & Dev., Inc. v. R.S.B. Enters., Inc.,* 608 N.W.2d 166, 170 (Mn. Ct. App. 2000) (fact that nonresident did not initiate contacts with the forum state will not preclude the exercise of jurisdiction under the Due Process Clause when "subsequent interstate communications by this nonresident seller demonstrate an eagerness to enter a business transaction").

In this age of global commerce, the Washington State Decision establishes a dangerous precedent of stripping states with the power of maintaining actions over nonresidents, through adherence to a formalistic rule that the purposeful availment requirement cannot be satisfied unless the nonresident "solicited" contacts with the forum state. This is contrary to this Court's jurisprudence, which has "abandoned more formalistic tests . . . in favor of a more flexible inquiry" as to whether a defendant's contacts with the forum state make it reasonable under the Due Process Clause "to defend the suit in that Court." *Quill Corp. v. North Dakota,* 504 U.S. 298, 308 (1992).

This Court should grant review to reconcile the conflict among the lower courts as to whether the Due Process Clause permits the exercise of jurisdiction over foreign persons transacting business within the states, regardless of whether they initiated contacts with the forum state.

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[20] *See, e.g., Mellon Bank (East) v. DiVeronica,* 983 F.2d 551, 557 (3rd Cir. 1993) (personal jurisdiction was not favored when the defendant did not initiate contact); *Railcar, Ltd. v. Southern Illinois Railcar Co.,* 42 F. Supp. 2d 1369, 1374 (N.D. Ga. 1999) ("the courts in this circuit have found personal jurisdiction lacking where the Georgia plaintiff initiates contact with the out-of-state defendant"); *CFA Med., Inc. v. Burkhalter,* 383 S.E.2d 214, 216-17 (N.C. Ct. App. 1989) (failure to initiate contact with the forum a "critical factor" in finding that the purposeful availment requirement was not satisfied).

CONCLUSION

Washington State's interpretation of the Due Process Clause threatens to create a chilling effect on international commerce. It creates an unduly narrow rule of when foreign parties may be haled into court consistent with "traditional notions of fair play and substantial justice." *International Shoe,* 326 U.S. at 316.[21] Furthermore, it contravenes this Court's admonition that "the Due Process Clause may not be readily wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Burger King,* 471 U.S. at 474.

In addition, the Washington State Decision is clearly at odds with the rulings of this Court as to when the purposeful availment requirement under the Due Process Clause is satisfied. Review is also necessary to resolve a conflict among the lower courts when nonresidents satisfy the purposeful availment requirement under the Due Process Clause by acting through agents or creating continuing obligations with the forum state although they did not "initiate" the transaction.

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[21] *See Burger King,* 471 U.S. at 476 ("It is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus *obviating the need for physical presence within a State in which business is conducted*") (emphasis added).

This Court should grant this Petition to preserve the due process principles embodied in more than half a century of American jurisprudence. Left undisturbed, the Washington State Decision threatens to erode these fundamental principles, and forestall America's ability to compete in the global marketplace.

Respectfully submitted,

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January 8, 2001

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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

TAHIR M. BAWAZIR,

Petitioner,

v.

SHEIKH KHALID BIN MAHFOUZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF WASHINGTON

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

[Filed Aug 28 1998]

The Honorable Jim Bates

SUPERIOR COURT OF
THE STATE OF WASHINGTON
FOR KING COUNTY

No. 98-2-14646-0 SEA

TAHIR M. BAWAZIR,

Plaintiff,

v.

THE BOEING COMPANY, a Delaware corporation,
and SHEIKH KHALID BIN MAHFOUZ,

Defendants.

ORDER GRANTING DEFENDANT KHALID BIN MAHFOUZ'S MOTION TO DISMISS AND JUDGMENT

This matter coming before the Court on August 28, 1998, pursuant to Defendant Khalid Bin Mahfouz's Motion to Dismiss and the Court having reviewed the following:

1. Defendant Kahlid Bin Mahfouz's Motion to Dismiss;

2. Defendant The Boeing Company's Motion to Dismiss, including attachments;

3. Plaintiff Tahir M. Bawazir's Memorandum in Opposition to Defendant Khalid Bin Mahfouz's Motion to Dismiss;

4. Plaintiff Tahir M. Bawazir's Memorandum in Opposition to Defendant The Boeing Company's Motion To Dismiss;

5. Declaration of Tahir M. Bawazir, including attached exhibits;

6. Declaration of David J. Dadoun in Support of Plaintiff's Memorandum in Oppositionto Khalid Bin Mahfouz's Motion to Dismiss;

7. Defendant The Boeing Company's Reply in Support of Its Motion to Dismiss; and

8. Reply Memorandum of Law of Defendant Kahlid Bin Mahfouz in Support of Motion to Dismiss,

and the Court having heard and considered argument of counsel, the Court being otherwise advised, IT IS HEREBY

ORDERED, ADJUDGED AND DECREED as follows:

1. Defendant Khalid Bin Mahfouz's Motion to Dismiss is granted as this Court lacks personal jurisdiction over said defendant.

2. Defendant Khalid Bin Mahfouz's Motion to Dismiss is granted on the doctrine of *forum non conveniens.*

JUDGMENT

Based upon the Court's granting of Defendant Khalid Bin Mahfouz's Motion to Dismiss, Judgment is hereby entered in favor of defendant Khalid Bin Mahfouz against Plaintiff Tahir M. Bawazir dismissing with prejudice all claims set forth in the First Amended Complaint against said defendant Khalid Bin Mahfouz.

DONE IN OPEN COURT this 28th day of August, 1998.

/s/ Jim Bates
The Honorable Jim Bates
Superior Court Judge

Presented by:

GORDON MURRAY TILDEN

By /s/ Charles C. Gordon
Charles C. Gordon, WSBA No. 1773
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APPENDIX B

[Filed APR 3 2000]

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

No. 43375-0-1
Division One

TAHIR BAWAZIR,
Appellant,

v.

THE BOEING COMPANY, a Delaware
corporation; and SHEIKH KHALID BIN MAHFOUZ,
Respondents.

[UNPUBLISHED]

COX, J. – At issue is whether the trial court properly dismissed the respective claims against the Boeing Company and Sheikh Khalid Bin Mahfouz. Under CR 12(b)(6), Tahir Bawazir's complaint fails to state a claim against either defendant upon which relief could be granted. Accordingly, we affirm.

In 1992, Boeing and Mahfouz began to execute a series of one-year Consultant Services Agreements, each of which had substantially similar terms. Mahfouz was named as the sole "Consultant" in each agreement. He agreed, among other things, to use his best efforts to promote the sale of Boeing aircraft to Saudia Arabian Airlines (Saudia), the national airline of Saudi Arabia. Boeing, in turn, agreed to pay "Consultant" a commission on any such sale.[1]

A Consultant Services Agreement dated May 9, 1995 is one of the series of agreements signed by Mahfouz and Boeing.[2] Bawazir was not made a party to that Agreement.[3] But he claims to have played a role in its performance.

In October 1995, during the term of the May 9, 1995 Agreement between Boeing and Mahfouz, Boeing signed contracts with Saudia for the future delivery of commercial aircraft.[4] We presume the aircraft were delivered to Saudia, triggering Boeing's duty to pay a commission.

In April 1996, Mahfouz directed Boeing to make the commission payments due under the Agreement to a special project account in his name at the National Commercial Bank (NCB) in Saudi Arabia.[5] Boeing sent to

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[1] Paragraph 5.1(a) of the Agreements provides in part:

> For the sale of new Aircraft made during the term of this Agreement, subject to the delivery of such Aircraft to the Customer, Boeing shall pay Consultant an amount in United States Dollars equal to the product of five percent (5%) multiplied by the invoiced purchase price of such Aircraft as determined pursuant to the Purchase Agreement therefore....

Clerk's Papers at 828.

[2] Clerk's Papers at 824-833.

[3] First Amended Complaint, paragraph 64. Clerk's Papers at 22.

[4] First Amended Complaint, paragraph 50. Clerk's Papers at 20.

[5] First Amended Complaint, paragraph 53. Clerk's Papers at 20.

Bawazir a commission check made payable to Mahfouz. Bawazir deposited it in the "Special Project Account" bearing Mahfouz's name.[6]

In August 1997, Boeing sent a second commission check to Bawazir. Unlike the previous commission payments, the check was made out to Bawazir, not Mahfouz.[7] The description on the check states, "Commission on advance payments received . . . in accordance with Agreement Number 6-1427-10B-1005/92.95."[8] Bawazir nevertheless deposited this check in Mahfouz's Special Project Account.[9]

In November 1997, Mahfouz wrote Boeing stating that, effective immediately, Bawazir was no longer authorized to serve as Mahfouz's representative in dealing with Boeing. In that same letter, Mahfouz stated that all future commission checks should be made directly payable to him.

Thereafter, Bawazir commenced this action in King County Superior Court against Boeing and Mahfouz. In his First Amended Complaint, Bawazir seeks declaratory relief, damages, and prejudgment interest. His claims against Boeing are based on allegations of breach of an agreement under which he is the third-party beneficiary, breach of implied contract, and unjust enrichment. He also seeks restitution.

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[6] First Amended Complaint, paragraph 53. Clerk's Papers at 20.

[7] First Amended Complaint, paragraph 54. Clerk's Papers at 20.

[8] Paragraph 54 of the complaint appears to contain a scrivener's error with respect to the Agreement number. It states that the check referenced "Agreement Number 6-1427-10B-1005/9.25." (Emphasis added) Clerk's Papers at 20.

[9] First Amended Complaint, paragraph 54. Clerk's Papers at 20.

His claims against Mahfouz are based on allegations of legal theories similar to those asserted against Boeing. But in addition, he also claims breach of a joint venture agreement between Mahfouz and him.

The trial court granted motions to dismiss by Boeing and Mahfouz, and Bawazir appeals.

Failure to State a Claim

A trial court's ruling on a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6) is a question of law that we review de novo.[10] Courts should dismiss under this rule only when it appears beyond a reasonable doubt that no facts justifying recovery exist.[11] CR 12(b)(6) motions should be granted " "sparingly and with care" and "only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." "[12] We presume the allegations of the complaint to be true.[13] In making our decision, we may consider hypothetical facts that are not a part of the record.[14]

If materials "outside the pleadings" are considered, the CR 12(b)(6) motion is treated as a summary judgment motion under CR 56.[15] In that case, we must determine if there are any genuine issues of material fact and if the moving party is entitled to judgment as a matter of law.[16] We consider all facts and reasonable inferences in the light most favorable to the nonmoving party.[17] We review questions of law de novo.[18]

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[10] *Cutler v. Phillips Petroleum Co.,* 124 Wn2d 749, 755, 881 P.2d 216 (1994), *cert. denied,* 515 U.S. 1169 (1995).

[11] *Cutler,* 124 Wn.2d at 755.

[12] *Cutler,* 124 Wn.2d at 755 (citations omitted).

[13] *Cutler,* 124 Wn.2d at 755.

[14] *Cutler,* 124 Wn.2d at 755.

Third-Party Beneficiary

Bawazir primarily contends that he was a third-party beneficiary of the May 9, 1995 Agreement between Boeing and Mahfouz.[19] He also claims that Boeing breached that Agreement by withholding commission payments due him. Neither claim is supported by the record.

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[15] *Mueller v. Miller*, 82 Wn. App. 236, 246, 917 P.2d 604 (1996); CR 12(b)(6). CR 12(b) states in part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

[16] CR 56(c).

[17] *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

[18] *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 813, 854 P.2d 1072 (1993).

[19] Although there were a series of agreements between Boeing and Mahfouz, all had substantially similar terms. The one at issue in this case appears to be the May 9, 1995 Agreement that triggered the commission payments based on sales of aircraft to Saudia. Bawazir specifically refers to that agreement in his complaint. For all these reasons, we focus on the terms of that agreement for purposes of our analysis.

A third-party beneficiary contract exists when the contracting parties intend to create one.[20] The test of intent is an objective one: whether performance under the contract would necessarily and directly benefit the third party.[21] Merely incidental, indirect or inconsequential benefits to a third party are insufficient to demonstrate an intent to create a third-party beneficiary contract.[22] Where there are no disputed material facts, we construe the contract as a matter of law.[23]

Applying the principles governing our review, which we have outlined previously in this opinion, we presume that the allegations of Bawazir's complaint are true. Thus, Bawazir's argument that Boeing contested material facts below is misplaced. But we examine the allegations of the complaint in light of the terms of the Agreement to which Bawazir specifically refers in his complaint. In doing so, we conclude that Bawazir has failed to overcome an "insuperable bar to [his request for] relief."[24]

Our Supreme Court's analysis of the insurance contracts at issue in *Postlewait* controls the outcome here. There, a lessee obtained insurance for two leased cranes, as required by the lease agreement. The insurer issued certificates of insurance to the lessor showing that the lessee had purchased insurance. After receiving the certificates, the lessor cancelled its own insurance on the cranes. When the cranes were damaged, the lessor sued the insurer directly for breach of the insurance agreement. In rejecting the claim, our Supreme Court held that the lessor was not an intended third-party beneficiary of the policy.

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[20] *Postlewait Constr., Inc. v. Great American Ins. Companies*, 106 Wn.2d 96, 99, 720 P.2d 805 (1986).

[21] *Postlewait*, 106 Wn.2d at 99.

[22] *McDonald Constr. Co., v. Murray*, 5 Wn. App. 68, 70, 485 P.2d 626 (1971).

[23] *Postlewait*, 106 Wn.2d at 100.

[24] *Cutler*, 124 Wn.2d at 755.

Looking to the insurance agreement, the *Postlewait* court observed that the lessor was neither the named insured nor mentioned in the policy.[25] And when it considered the effect of the insurer's issuance of the insurance certificates, the court held that the certificates did not demonstrate any intent by the insurer to assume a direct obligation to the lessor. Central to the court's holding was the fact that the certificates did not indicate that the lessor had any ownership interest, and thus no insurable interest, in the cranes. In short, the certificates were not the equivalent of a policy.

Here, we look to the allegations of Bawazir's complaint. Paragraph 64 states: "Bawazir was not made a party to the Consultant Services Agreement. Bawazir was an intended third-party beneficiary to the contract."[26] Thus, Bawazir expressly concedes that he was neither named nor mentioned in the Agreement that gives rise to Boeing's duty to pay a commission. Accordingly, we look to other allegations in the complaint to determine what supports the legal theory that Bawazir was an intended third-party beneficiary of the Agreement. Bawazir expressly alleges that "[I]n reliance upon the [Agreement], Bawazir provided valuable services to Boeing."[27] But Bawazir's alleged reliance on the Agreement does nothing to demonstrate that it was the intent of the parties to the Agreement that Bawazir be an intended beneficiary under that document. Unlike the lessor in *Postlewait,* Bawazir does not even have any analog to the insurance certificates that our Supreme Court nevertheless found insufficient to support the conclusion that a third-party beneficiary relationship existed.

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[25] *Postlewait*, 106 Wn.2d at 101.

[26] Clerk's Papers at 22.

[27] First Amended Complaint, paragraph 65. Clerk's Papers at 22.

Bawazir also claims that the Agreement's provision for a five per cent commission shows that he was an intended beneficiary. But we fail to see how the authority that he cites in his brief[28] when considered with the allegations of his complaint show that he is an intended beneficiary of the Agreement.

Likewise, his contention that he is a named "principal" in the Consultant Services Application and the fact that the Agreement refers to "Principals" are of no benefit to him. These provisions do nothing to show that the parties intended him to benefit under the Agreement. Further, it does not evidence Boeing undertaking an obligation to pay Bawazir anything.

Bawazir's other allegations, that there was an understanding that he would be a "significant participant in the venture with Sheikh Mahfouz under the agreement"[29] and that he initialed every page of the Agreement,[30] do not alter our analysis. Even presuming the truth of these allegations, they cannot overcome the fact that Bawazir is not a party to the Agreement and that there is nothing evidencing any obligation of Boeing to pay Bawazir anything.

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[28] *Charlotte Aircraft Corp. v. Purdue Airlines, Inc.*, 498 F.2d 152 (8th Cir. 1974).

[29] First Amended Complaint, paragraph 16. Clerk's Papers at 10-11.

[30] First Amended Complaint, paragraphs 17 and 30. Clerk's Papers at 11, 14.

We also reject Bawazir's contention that Boeing's attempts to bind him to the confidentiality provisions of the Agreement makes him an intended beneficiary under the Agreement for the purpose of payment of commissions. Bawazir argues that such action by Boeing constitutes an admission that it owes him a commission. But the authority on which he relies to support that argument simply has no application here.

In *Hardgrove v. Bowman,*[31] Bowman appealed a trial court award in Hardgrove's favor, arguing that the trial court erred by failing to consider evidence of his damages allegedly caused by Hardgrove's breaches of a lease agreement. But in a previous unlawful detainer action brought by Bowman against Hardgrove, Bowman successfully argued that the lease was invalid.[32] It was in this context that our Supreme Court made the statement on which Bawazir now relies: "A litigant will not be heard to say in one breath that a contract is of no force or effect, and in the next assert a right to recover upon it."[33]

Here, Boeing is not taking the benefits of the Agreement while rejecting its burdens. Rather, Boeing sought to enforce the Agreement's confidentiality provision against Mahfouz, the only other party to the Agreement. And because Bawazir was an agent of Mahfouz, he was bound to the same extent as Mahfouz. Moreover, there is nothing to demonstrate that Boeing in any way failed to perform its obligations under the Agreement. In short, the principle announced in *Hardgrove* has no application here.

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[31] 10 Wn.2d 136, 116 P.2d 336 (1941).

[32] *Bowman v. Hardgrove,* 200 Wash. 78, 93 P.2d 303 (1939).

[33] *Hardgrove,* 10 Wn.2d at 138.

Bawazir relies heavily on the fact that Boeing issued a commission check made payable to him that he deposited into Mahfouz's Special Project Account as evidence that Boeing acknowledged an obligation to pay him a commission. We take this as Bawazir's attempt to present a hypothetical set of facts that entitle him to avoid the result of the CR 12(b)(6) motion.

In response to Bawazir's argument, Boeing argues that it "erroneously" made the commission check payable to Bawazir rather than to Mahfouz. Boeing further argues that the check cannot properly be considered as evidence of the parties' original intent to create a third-party beneficiary contract because Boeing issued the check *after* executing the Agreement. Relying on certain language in *Postlewait,* Boeing contends that post-signing conduct cannot be used to interpret the parties' intent under the contract. We disagree with Boeing's position on this point.

Notwithstanding the cited language in *Postlewait,* there is other case authority that indicates that post-signing conduct may be considered to interpret the original intent of parties to a contract.[34] But we are not required here to determine whether the view stated in *Postlewait* or that stated in *Stender* and subsequent authority is correct.

First, the legend on the check payable to Bawazir specifically referenced the Agreement. Nothing in that Agreement supports Bawazir's allegation that he is an intended beneficiary of it. Moreover, Paragraph 11 of the Agreement prohibits an assignment "without the prior written consent of the other."[35] It further states that "Consultant shall make no assignment of payments to be made hereunder to any person or entity other than a financial institution."[36] The complaint does not allege that any such assignment under either of these provisions occurred here. Thus, there is no showing that Bawazir acquired the right to receive payments under the Agreement.

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[34] *See, e.g., Wlasiuk v. Whirlpool Corp.,* 81 Wn. App. 163, 174, 914 P.2d 102 (1996) (citing *Stender v. Twin City Foods, Inc.,* 82 Wn.2d 250, 254, 510 P.2d 221 (1973)).

Second, even if we were to conclude that a third-party beneficiary agreement existed, there is nothing in the record to substantiate how Boeing breached the agreement. Paragraph 68 of the complaint states: "Boeing has failed to make commission payments in a manner ensuring that Bawazir receive the compensation to which he is entitled as a third-party beneficiary to the Consultant Services Agreement."[37] This cryptic reference fails to explain the source of any such obligation and how it operates to impose an obligation on Boeing to make any additional payments beyond those it already has made. In view of the express terms of the written Agreement and in the absence of any allegations[38] in the pleadings of how Boeing breached, there is simply nothing before us to demonstrate that Boeing must pay more. Rather, it appears that Boeing made all commission payments under the Agreement, and that the division of those payments is a matter between Bawazir and Mahfouz.

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[35] Clerk's Papers at 831.

[36] Consultant Services Agreement, paragraph 11. Clerk's Papers at 831.

[37] Clerk's Papers at 23.

[38] At oral argument, Bawazir suggested that he had an oral agreement with Boeing. But there is no allegation of such an agreement in the complaint. And there is no allegation in the complaint that Boeing promised to pay anything more than the commission provided for in the Agreement.

In short, the Agreement clearly demonstrates that Boeing's only obligation to pay commissions was to Mahfouz, not Bawazir. The allegations of the complaint fail to establish that Bawazir was an intended third-party beneficiary under the Agreement. The trial court properly dismissed this claim against Boeing.

Breach of Implied In Fact Contract

Bawazir also contends that an implied contract existed between himself and Boeing. We disagree.

A contract implied in fact arises from the acts and conduct of the parties, indicating a mutual intention to contract with each other.[39] Whether such a contract exists is generally a question for the trier fact.[40]

Relying on *Hall v. Douglas Aircraft Company,*[41] Bawazir argues that he became Boeing's agent because he was the primary source of contact with Boeing in its negotiations with Saudia. According to Bawazir, that agency relationship constitutes an implied in fact contract under which Boeing is directly obligated to him.

In *Hall,* Douglas Aircraft directed Shumaker, its broker, to negotiate the sale of airplanes to the Chinese government. In one transaction, Shumaker appointed Hall, the plaintiff, as his assistant. Shumaker informed Douglas Aircraft of the appointment, and at Shumaker's direction, Douglas Aircraft informed the Chinese government of Hall's authority to negotiate contracts between it and the Chinese government. Thereafter, Douglas Aircraft and Hall corresponded directly, and Douglas Aircraft directed Hall's conduct regarding the negotiations of the contract.

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[39] *Lynch v. Deaconess Med. Center,* 113 Wn.2d 162, 165, 776 P.2d 681 (1989).

[40] *Kilthau v. Covelli,* 17 Wn. App. 460, 462, 563 P.2d 1305, *review denied,* 89 Wn.2d 1010 (1977).

[41] 23 Cal. App. 2d 498, 73 P.2d 668 (1937).

Shortly before executing a sales contract with the Chinese government, Douglas Aircraft canceled Hall's representation. When Douglas Aircraft paid a commission to Shumaker, Hall brought an action to recover the commission owed to him. On review, the appellate court held that Douglas Aircraft had incurred directly liability to compensate Hall for his services:

> By its ratification of the appointment and its subsequent conduct in directing plaintiff concerning the conduct of the negotiations defendant constituted plaintiff its own agent and became liable for his compensation. It is a general rule that in the absence of an agreement to the contrary a request by one party to another to render services gives rise to a liability to compensate for the services when rendered.[42]

Bawazir argues that he is in the same position as was Hall. But unlike Hall, Bawazir never became Boeing's agent. That Bawazir was the primary contact with Boeing or that he was a "significant participant" in the agreement between Mahfouz and Boeing does not convert him from Mahfouz's to Boeing's agent. Bawazir does not allege, nor does the record show, that Boeing directed or requested specific conduct regarding the negotiations with Saudia. Moreover, nothing indicates that Bawazir was authorized, as was Hall, to execute contracts between Boeing and Saudia. Rather, that authority remained solely with Mahfouz.

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[42] *Hall*, 23 Cal. App.2d at 506, 73 P.2d at 672.

In sum, Bawazir has failed to demonstrate in his pleadings an implied in fact contract claim upon which relief can be granted. The trial court also properly dismissed this cause of action under CR 12(b)(6).

Breach of Implied in Law Contract

Bawazir argues that a contract implied in law exists between himself and Boeing, and that Boeing breached this alleged contract. We also disagree with this contention.

A contract implied in law, also called a quasi contract, "arises from an implied legal duty or obligation" and is "founded upon the equitable principle of unjust enrichment."[43] To state a quasi contract claim, a plaintiff must show that (1) the enrichment of the defendant is unjust, and (2) the plaintiff is not a "mere volunteer."[44]

It is undisputed that Bawazir was not a volunteer. Thus, only the first element, unjust enrichment, is at issue. Relying on *Trane Co. v. Randolph Plumbing and Heating,*[45] Bawazir asserts that Boeing has been unjustly enriched because it received the benefit of his services without paying for them. In *Trane,* a subcontractor contracted with Trane to supply fans to its general contractor. The general contractor accepted delivery of the fans. Before the fans were installed, the subcontractor became insolvent and left the work site without colleting payment from its general contractor or making payment to Trane for the fans. The general contractor completed the work, including installing the fans, and received payment on a performance bond running to it from the subcontractor. On review, the court held that the general contractor had been unjustly enriched at Trane's expense.

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[43] *Lynch,* 113 Wn.2d at 165.

[44] *Lynch,* 113 Wn.2d at 165.

[45] 44 Wn. App. 438, 441, 722 P.2d 1325 (1986).

But unlike the general contractor in *Trane*, Boeing here has not retained the benefit of contractual services without paying for them. It has made commission payments to Mahfouz, the party to whom it is contractually obligated. In contrast, Randolph made no payments to either Griggs or Trane for the fans Trane supplied at Griggs' request. By retaining goods without paying for them, Randolph was unjustly enriched. Boeing, on the other hand, has paid for the services from which it benefited. As we observed earlier, the division of Boeing's payments between Bawazir and Mahfouz is the central issue of this dispute.

Accordingly, Boeing correctly contends that regardless of any action that may exist between Bawazir and Mahfouz, these circumstances do not give rise to a quasi contract between it and Bawazir. The trial court properly dismissed this claim.

Unjust Enrichment

As noted above, Bawazir has failed to demonstrate that Boeing has been unjustly enriched. Because Bawazir has not met a necessary element of this equitable claim, the trial court properly dismissed the claim under CR 12(b)(6).

The trial court properly dismissed Boeing from the action because none of the claims withstand scrutiny under the analysis applied in a CR 12(b)(6) motion.

Personal Jurisdiction

We turn now to the propriety of dismissing Mahfouz. Bawazir contends that the trial court improperly dismissed his claims against Mahfouz on the basis of lack of personal jurisdiction.[46]

A trial court's ruling on the existence of personal jurisdiction is a question of law reviewable de novo when the underlying facts are undisputed.[47] Here, the allegations in Bawazir's pleadings are considered substantiated for purposes of review on appeal.[48] The question on Mahfouz's CR 12(b)(6) motion is whether he has demonstrated beyond a reasonable doubt that the trial court did not have personal jurisdiction over Mahfouz.

Washington law permits a state court to exercise either general or specific personal jurisdiction over a nonresident defendant.[49] Bawazir argues that both general and specific jurisdiction exists over Mahfouz. We do not agree.

Specific Jurisdiction

Specific jurisdiction over a nonresident defendant is properly exercised when the defendant's limited contacts give rise to the cause of action.[50] Specific jurisdiction is authorized by RCW 4.28.185, Washington's "long-arm" statute. That statute provides in part:

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[46] While Mahfouz does not articulate the precise rule under which he brought his motion, he appears to rely on the allegations of the complaint to show that the court had no jurisdiction over the dispute between Mahfouz and Bawazir. Based on that approach, we apply the standards of CR 12(b)(6) to the motion.

[47] *Lewis v. Bours*, 119 Wn.2d 667, 669, 835 P.2d 221 (1992).

[48] *See MBM Fisheries, Inc. v. Bollinger Mach. Shop and Shipyard, Inc.*, 60 Wn. App. 414, 418, 804 P.2d 627 (1991).

[49] *MBM Fisheries*, 60 Wn. App. at 418.

[50] *MBM Fisheries*, 60 Wn. App. at 422-23; RCW 4.28.185.

> (1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person . . . to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
>
> (a) The transaction of any business within this state;
>
> . . .
>
> (3) Only causes of action arising from act enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.[51]

Under the long-arm statute, a Washington court may exercise personal jurisdiction over a foreign entity for the transaction of business in this state if each of the following factors are satisfied:

> (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.[52]

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[51] RCW 4.28.185.

[52] *Shute v. Carnival Cruise Lines,* 113 Wn.2d 763, 767, 783 P.2d 78 (1989).

To meet the first factor of the above test, Bawazir must show that Mahfouz purposefully availed himself of the benefits and protections of this state's laws.[53] And for the purposes of this case, he must show that Mahfouz purposely availed himself of these benefits and protections with respect to the alleged agreement or relationship between Mahfouz and him giving rise to an obligation of Mahfouz to share commission payments with him. This he cannot do.

Relying on *Cofinco of Seattle, Ltd. v. Weiss*[54] and *Burger King Corp. v. Rudzewicz,*[55] Bawazir first argues that Mahfouz's employment with Boeing confers jurisdiction over Mahfouz because employment contracts between a nonresident and a Washington State business confer jurisdiction in a Washington court. This misses the point.

First, the Agreement expressly disclaims any employment relationship between Mahfouz and Boeing.[56] Second, the Agreement is distinct from any alleged agreement between Mahfouz and Bawazir over sharing in the commission payments made by Boeing. It is with respect to the latter agreement that Bawazir must show some purposeful availment in Washington, not the former.

But Bawazir's complaint is virtually silent about the details of any agreement between himself and Mahfouz.

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[53] *CTVC of Hawaii, Co., Ltd. v. Shinawatra,* 82 Wn. App. 699, 710, 919 P.2d 1243 (1996), *review denied,* 131 Wn.2d 1020 (1997).

[54] 25 Wn. App. 195, 196-97, 605 P.2d 794 (1980).

[55] 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

[56] Paragraph 12.1 of the Agreement states in part, "In performing Consultant's obligations hereunder, Consultant shall in all respects be an independent contractor." Clerk's Papers at 831-832.

Bawazir alleges that Mahfouz "approached him to take the lead on pursuing a consulting relationship with Boeing,"[57] and that thereafter he and Mahfouz "formed a joint venture."[58] Bawazir alleges no other facts that indicate whether this agreement has any relationship to this state. Thus, the allegations of the complaint do not demonstrate, with respect to Bawazir's agreement with Mahfouz, that Mahfouz purposefully availed himself of the benefit of Washington laws. The trial court properly dismissed the claims against Mahfouz on the basis that personal jurisdiction over Mahfouz does not exist.

Bawazir's arguments that the purposeful availment requirement is met rest primarily on the Agreement between Mahfouz and Boeing. As we have discussed, that agreement is irrelevant in determing whether personal jurisdiction exists over Mahfouz in an action brought by Bawazir. Yet, even if we were to consider the Agreement, Bawazir's arguments still fail.

Bawazir argues that the entire circumstances of the Agreement satisfy the purposeful act requirement. Specifically, he contends that by corresponding with and receiving and following direction from Boeing officials in Seattle, by visiting Seattle to attend negotiation or financing meetings, and by sending agents to Seattle on his behalf, Mahfouz purposefully availed himself of the benefits of this state. But this court has held that similar contacts by foreign nationals in the course of executing contracts with residents of Washington did not satisfy the purposeful act requirement.

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[57] First Amended Complaint, paragraph 13. Clerk's Papers at 10.

[58] First Amended Complaint, paragraph 16. Clerk's Papers at 10.

In *Shinawatra,* the only contact that the defendant, a Thai national, had with the state was his presence to negotiate part of a contract. That he came to Seattle for those negotiations, that he attended business dinners and socialized in Seattle, or that he had access to a line of credit at a Washington bank did not demonstrate that he had purposely acted in Washington.

Likewise, in *Washington Equipment Manufacturing Co., Inc. v. Concrete Placing Co, Inc.,* [59] the purposeful act requirement was not met. Concrete Placing, an Idaho corporation, contracted to purchase concrete machinery from Washington Equipment, a Washington corporation. Concrete Placing's contacts with Washington, including several telephone calls, visiting and inspecting Washington Equipment's manufacturing plant in Spokane, and having the equipment delivered "F.O.B.", were insufficient to establish that Concrete Placing purposefully availed itself of the benefits of Washington law.

And persuasive to this court was the fact that Washington Equipment solicited the contract with Concrete Placing: "Whether a foreign corporation has purposefully availed itself of the benefits of this state frequently turns on which party solicited the agreement and where."[60] Here, Bawazir alleges that Boeing "approached" Mahfouz to solicit him as a consultant.[61] Like Concrete Placing's contacts with Washington, Mahfouz's contacts do not meet the purposeful availment requirement.

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[59] 85 Wn. App. 240, 931 P.2d 170 (1997).

[60] *Washington Equipment,* 85 Wn. App. 246-47.

[61] First Amended Complaint, paragraph 11. Clerk's Papers at 9.

Bawazir has simply failed to establish that by executing the Agreement with Boeing, Mahfouz purposefully availed himself of the benefits of Washington law.

We similarly reject Bawazir's remaining arguments that Washington courts may exercise specific jurisdiction over Mahfouz. Thus, we conclude that the Agreement's choice-of-law provision does not demonstrate that Mahfouz consented to personal jurisdiction. The United States Supreme Court and Washington courts have held that choice-of-law provisions are insufficient to confer personal jurisdiction.[62] We likewise conclude that Bawazir's own contacts in Washington as Mahfouz's agent may not be imputed to Mahfouz to satisfy the purposeful act requirement. Washington's long-arm statute expressly states that Washington courts may exercise jurisdiction over any person "who in person or through an agent" transacts business in the state.[63] But where an agent sues his principal, he cannot impute his own acts in the forum as a basis for obtaining jurisdiction over the non-domiciliary principal.[64]

In sum, Bawazir has failed to demonstrate that the purposeful availment requirement is met. And because this first necessary element is not met, we need not address the remaining elements necessary to establish specific jurisdiction.

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[62] *See, e.g., Burger King*, 471 U.S. at 482; *Kysar v. Lambert*, 76 Wn. App. 470, 485, 887 P.2d 431, *review denied*, 126 Wn.2d 1019 (1995) ("Generally speaking, a choice-of-forum clause shows consent to personal jurisdiction, while a choice-of-law clause does not.").

[63] RCW 4.28.185.

[64] *See, e.g., New World Capital Corp. v. Poole Truck Line, Inc.*, 612 F. Supp. 166, 172 (S.D.N.Y. 1985); *Caballero Spanish Media, Inc. v. Betacom, Inc.*, 592 F. Supp. 1093, 1095-96 (S.D.N.Y. 1984).

General Jurisdiction

Bawazir also alleges that Washington courts can exercise general jurisdiction over Mahfouz.

If a nonresident defendant is "transacting substantial and continuous business of such character as to give rise to a legal obligation," a Washington court may exercise general jurisdiction over that defendant. This exercise of general jurisdiction is proper regardless of whether the cause of action is related to the defendant's contacts with Washington.[65]

Here, Bawazir alleges that Mahfouz's extensive contacts with Washington justify an exercise of general jurisdiction. First, he alleges that Mahfouz has a "substantial relationship" not only with Boeing but with the Frank Russell Company, another Washington entity. But Bawazir's own declaration makes clear that the Frank Russell Company was acting as a consultant to Saudi bank NCB, not to Mahfouz individually. NCB's relationship with the Frank Russell Company does not evidence that Mahfouz was "transacting substantial and continuous business" in Washington for purposes of establishing general jurisdiction over him.

Second, Bawazir alleges that it is his understanding that Mahfouz's family maintained a residence in Seattle. But the actions of Mahfouz's family are irrelevant to our inquiry, whether Mahfouz himself was "doing business" in this state. Likewise, Bawazir's allegation that Mahfouz owns two Boeing jets and can conveniently travel to Washington does not establish that Mahfouz was doing business here.

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[65] *MBM Fisheries*, 60 Wn. App. at 418.

In short, Bawazir has not demonstrated that Mahfouz is subject to the general jurisdiction of Washington courts. The trial court properly dismissed his claims against Mahfouz.

In Rem Jurisdiction

In addition to specific and general jurisdiction, Bawazir argues that personal jurisdiction over Mahfouz exists on the basis of *in rem* jurisdiction over the commission payments made from Boeing to Mahfouz. We disagree.

Bawazir relies on RCW 4.28.185(1)(c) for this argument. RCW 4.28.185(1)(c) states that a person submits "to the jurisdiction of the courts of this state as to any cause of action arising from . . . [t]he ownership, use, or possession of any property whether real or personal situated in this state."

Here, Bawazir has not alleged, as the statute requires, that Mahfouz had "ownership, use, or possession" of the commission payments while they were "situated in this state." Rather, according to the allegations of the complaint, those payments were sent directly to the Special Project Account at NCB, located in Saudi Arabia. Moreover, whether millions of dollars of future commission checks remain in Boeing's Seattle bank account is, at this point, speculative and irrelevant. Even if that money is still owing and is still "situated in this state," it is in the "ownership, use, or possession" of Boeing, not Mahfouz.

Bawazir has not demonstrated that personal jurisdiction exists over Mahfouz on the basis of *in rem* jurisdiction over commission payments made by Boeing to Mahfouz.

Discovery

Bawazir next argues that the trial court committed reversible error by dismissing Bawazir's claims without first permitting discovery on issues related to Mahfouz's contacts with Washington state.

The right to discovery is not unlimited. Trial courts have the authority to exercise discretion in limiting discovery in order to control the litigation before it.[66] Discovery orders are reviewed for abuse of discretion that results in prejudice to a party or person.[67] A trial court abuses its discretion when a ruling is manifestly unreasonable or exercised on untenable grounds or for untenable reasons.[68]

Here, Bawazir had the burden of establishing a "prima facie" showing of personal jurisdiction.[69] It is not untenable for the trial court to require at least a threshold showing of jurisdiction before permitting discovery to determine whether sufficient contacts support jurisdiction. Yet none of Bawazir's allegations against Mahfouz demonstrate that such contacts exist. The trial court did not abuse its discretion in denying discovery on this issue.

Because we conclude that Washignton courts do not have personal jurisdiction over Mahfouz, we need not address Bawazir's challenge to the dismissal based on forum non conveniens.

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[66] *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 777, 819 P.2d 370 (1991).

[67] *Doe*, 117 Wn.2d at 777.

[68] *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

[69] *Shinawatra*, 82 Wn. App. at 708.

We affirm the orders dismissing all claims against Boeing and Mahfouz.

/s/ Cox, J.

WE CONCUR:

/s/ Kennedy, C.J.

/s/ Grosse, J.

APPENDIX C

[Filed Oct 11 2000]

THE SUPREME COURT OF WASHINGTON

No. 69847-3

C/A NO. 43375-0-I

TAHIR BAWAZIR,

Petitioner,

v.

THE BOEING COMPANY, a Delaware corporation;
and SHEIKH KHALID BIN MAHFOUZ,

Respondents.

ORDER

Department II of the Court considered this matter at its October 10, 2000, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 11th day of October, 2000.

/s/ Richard P. Guy
CHIEF JUSTICE

APPENDIX D

[Filed Jun 16 1998]

SUPERIOR COURT OF WASHINGTON
IN AND FOR KING COUNTY

No. 98-2-14646-OSEA

TAHIR M. BAWAZIR,

Plaintiff,

v.

THE BOEING COMPANY, a Delaware corporation,
and SHEIKH KHALID BIN MAHFOUZ,

Defendants.

FIRST AMENDED COMPLAINT

Plaintiff Tahir M. Bawazir alleges as follows:

SUMMARY OF ALLEGATIONS

This lawsuit arises from Boeing's successful effort in the early 1990s to sell approximately $5.2 billion in commercial airplanes to Saudia Airlines, a state-owned corporation of the Kingdom of Saudi Arabia. Plaintiff Bawazir and defendant Sheikh Khalid Bin Mahfouz formed a joint venture to assist Boeing in the competition for the Saudia order, with the understanding they were to be paid a commission based on a percentage of the contract's value, if Boeing's sales effort was successful. However, shortly after entering a consulting agreement with Boeing, Sheikh Mahfouz became enbroiled in the BCCI banking scandal, and was indicted for fraud by a New York Grand Jury. The United States Government filed a separate civil complaint against Sheikh Mahfouz for violations of federal banking laws. During the two most critical years of the competition for the Saudia deal, Sheikh Mahfouz was unable and unwilling to assist Boeing, and Bawazir alone provided virtually all consulting support to Boeing. Indeed, during this time Sheikh Mahfouz asked Mr. Bawazir to cancel the consulting agreement with Boeing. Mr. Bawazir succeeded in convincing Boeing not to cancel the contract, preserving his right to a share of the commissions if Boeing was successful.

On a purely contingent basis, Bawazir worked extensively on Boeing's behalf, serving as Boeing's principal contact in Saudi Arabia during the six years Boeing pursued the Saudia sale. Mr. Bawazir corresponded frequently with Boeing, traveled extensively at Boeing's request for meetings to further the sales effort, and was authorized to sign correspondence to Saudi Arabian officials on Boeing's behalf. Bawazir spent thousands of hours assisting Boeing in the potential contract.

Boeing was in a fiercely competitive battle with the European consortium, Airbus, and McDonnell Douglas, to win a share of the Saudia Airlines contract. There was no guarantee that Boeing would win the contract and that Mr. Bawazir would be compensated for his work.

The Boeing contract with Saudia Airlines was of critical importance to the State of Washington and the United States. The competition came during a worldwide recession in the commercial aircraft industry resulting in layoffs of Boeing employees in the Seattle area. In fact, President Clinton intervened on Boeing's behalf to lobby Saudi Arabia's King Fahd to award the contract to Boeing. The White House publicly announced at an official ceremony – attended by Washington State's Congressional Delegation – that Saudi Arabia had awarded a commercial contract to Boeing.

Boeing recognized Bawazir's role in helping Boeing win the contract. Boeing's then CEO Frank Shrontz wrote after Boeing won the Saudia contract that Mr. Bawazir was a "major contributor" to the successful result.

Commission payments are due under the consulting agreement as commercial aircraft are delivered to Saudia. Boeing has made commission payments to Sheikh Mahfouz pursuant to the terms of the consulting agreement, and is scheduled to make additional payments during the next several years. However, Mr. Bawazir has not received any compensation for his efforts. This lawsuit seeks such compensation by recovering Mr. Bawazir's share of the commission payments.

THE PARTIES

1. *Plaintiff Tahir M. Bawazir.* Plaintiff Tahir M. Bawazir ("Bawazir") is a citizen of the Republic of Yemen.

2. *Defendant The Boeing Company.* Defendant The Boeing Company ("Boeing") is a Delaware corporation with its principal place of business and world headquarters in Seattle, Washington. Boeing transacts business in and at all material times to this lawsuit has been a resident of King County, Washington.

3. *Defendant Sheikh Khalid bin Mahfouz.* Defendant Sheikh Khalid bin Mahfouz ("Sheikh Mahfouz") is a citizen and resident of the Kingdom of Saudi Arabia.

JURISDICTION AND VENUE

4. This Court has jurisdiction under RCW 2.08.010 and 4.28.020.

a. *Jurisdiction over Boeing.* This Court has jurisdiction over Boeing because Boeing has transacted business and its world headquarters have been located in Seattle, Washington at all material times to this cause of action.

b. *Jurisdiction over Sheikh Mahfouz.* This Court has jurisdiction over Sheikh Mahfouz. This lawsuit arises from and relates to Sheikh Mahfouz's transaction of business within the State of Washington, and the situs of future commissions owed to Bawazir are in possession of Boeing, in King County, Washington.

5. *Venue.* Venue for this action properly lies in this Court under RCW 4.12.025 because Boeing is a resident of King County, Washington.

FACTUAL ALLEGATIONS

6. In 1989 and 1990, officials of Saudia Arabia Airlines ("Saudia") began to discuss the need to update their aging fleet of commercial passenger aircraft. Saudia's last major commercial aircraft acquisition had been in the early 1980s when it placed a larger order with Boeing.

7. Boeing was very interested in capturing a share of the Saudia commercial aircraft order. During the early 1990s, the commercial aircraft industry was in a worldwide recession. Airline travel had dropped precipitiouly in the wake of the Persian Gulf Conflict and the recession in many countries that had followed it. A number of Boeing customers had cancelled or deferred orders for commercial aircraft. Boeing was facing the prospect of

laying off large numbers of its employees in the Seattle area as production was slashed to meet declining demand. In addition, Boeing was preparing to launch a new, wide-bodied aircraft named the 777, and was in need of additional orders for that launch.

8. It was anticipated that competition for the Saudia contract would be intense. Boeing's arch-rivals, Airbus and McDonnell Douglas, also badly needed a portion of the potential Saudia order. They had likewise suffered declining demand as a result of the worldwide recession in the commercial aircraft industry.

9. The Kingdom of Saudi Arabia is governed by a monarchy. Saudia is a state-owned corporation of the Kingdom of Saudi Arabia. Saudia's Chairman is Prince Sultan, Saudi Arabia's Defense Minister and brother of King Fahd, the ruler of Saudi Arabia. The Royal Family has traditionally reserved for itself decisions about major military and commercial aircraft acquisitions. It was expected that the King and the Prince would be ultimately responsible for making the final decision about awarding a commercial aircraft contract for Saudia's fleet in the early 1990s.

10. Boeing had previously retained as consultants Saudi Arabian businessmen with a knowledge and understanding of the unique business practices, culture and politics of the people who would provide advice and help make decisions about commercial aircraft purchases for Saudi Arabia. As discussions about the Saudia purchase began in the early 1990s, Boeing decided to explore the possibility of making a change in its consulting arrangements. In 1991, Boeing began discussions with a number of Saudi Arabian businessmen about the possibility of obtaining consulting advice from them.

11. One of the individuals Boeing approached was Sheikh Khalid bin Mahfouz. Sheikh Mahfouz was then the Deputy General Manager and head of international operations, and along with his family, majority shareholder of the National Commercial Bank ("NCB"), reportedly the largest bank in Saudi Arabia. Sheikh Mahfouz was widely reported to be the "banker to the king" of Saudi Arabia. In addition to his NCB holdings, Sheikh Mahfouz is reported to have extensive financial holdings worldwide, including in the United States. He was, for example, a principal shareholder in a foreign bank group known at the time as Bank of Credit and Commerce International ("BCCI"). Sheikh Mahfouz served as a director of BCCI from 1986 to 1989. BCCI had significant holdings and operations in the United States during the time that Sheikh Mahfouz served as one of its directors. Unknown to anyone at the time Boeing was soliciting possible consultants for the Saudia sales effort, a scandal involving BCCI would soon engulf Sheikh Mahfouz and sap his ability or interest to provide consulting services to Boeing at the time they were most needed.

12. In 1991, Sheikh Mahfouz met with Boeing representatives to discuss the possibility of a consulting relationship. Upon information and belief, Boeing representatives indicated they were aware Sheikh Mahfouz was very busy tending to his worldwide investments and would not by himself be able to provide Boeing with the level of consulting services required for the Saudia transaction. Boeing suggested that Sheikh Mahfouz affiliate with someone who would provide the consulting services Boeing would require.

13. Sheikh Mahfouz approached Bawazir and asked him to take the lead on pursuing a consulting relationship

with Boeing. The Bawazir and Sheikh Mahfouz families had a relationship going back several decades. The relationship began before Bawazir fled to Saudi Arabia in the late 1960s from his native South Yemen when the government was overthrown by a Communist dictatorship.

14. For a time, Bawazir worked in senior management for companies owned by the Mahfouz family. By 1990, Bawazir and other members of his family had become business partners with Sheikh Mahfouz in a number of business joint ventures. Bawazir supplied management, financial analysis and other business skills – the sweat equity – in these ventures while Sheikh Mahfouz provided financing and other support. Each shared a percentage of the returns from their joint ventures.

15. Sheikh Mahfouz and Bawazir were one of several teams vying to act as Boeing's consultant in the competition for the Saudia commercial airplane order. Bawazir met with Boeing senior management on several occasions beginning in the Fall of 1991, and was responsible for preparing the formal application and other pertinent information for the consultant services contract. At the request of Sheikh Mahfouz, Bawazir provided Boeing with Sheikh Mahfouz's personal references, including George F. Russell, Chairman and CEO of the Frank Russell Company that is headquartered in Tacoma, Washington. Upon information and belief, Sheikh Mahfouz either directly and/or indirectly through NCB, has extensive business dealings with Frank Russell Company.

16. Bawazir played a role in convincing Boeing to choose the Bawazir/Sheikh Mahfouz-joint venture, and in March 1992 a Consultant Agreement for a term of one year was executed between Boeing and Sheikh Mahfouz ("1992 Consultant Agreement"). Upon information and belief, Boeing entered into a consulting agreement with

Sheikh Mahfouz with the understanding that Bawazir would be a significant participant in the venture with Sheikh Mahfouz under the agreement.

17. The agreement designated the Bawazir/Sheikh Mahfouz team as Boeing's non-exclusive sales consultants for Saudi Arabia and the Republic of Yemen, a country that had recently been formed by the combination of North and South Yemen. Sheikh Mahfouz requested that the agreement be executed in his name, and he signed the 1992 Consultant Agreement and all subsequent versions of it in later years. Bawazir initialed each page of the Consultant Agreement and was identified as a "key" person to perform the duties of the Mahfouz/Bawazir team.

18. Under the terms of the 1992 Consultant Agreement and all renewals that followed, the Bawazir/Mahfouz team was to be compensated on a purely contingent basis and only if Boeing was awarded a contract to deliver commercial aircraft to the airlines for Saudi Arabia or Yemen, and those planes were actually delivered. Under the terms of the agreement, Boeing was to pay a percentage commission to be calculated on the price at delivery of the aircraft.

19. As a condition of entering a consulting agreement, Boeing insisted that its relationship with the Bawazir/Mahfouz team be subject to and governed by the laws of the United States and of Washington State. The consultant agreements themselves were governed by the law of Washington State.

20. In addition, the consultant agreements provided that the Mahfouz/Bawazir team was prohibited from making any gift or providing any kickback in violation of "any applicable law, regulation or decree of the government of the United States." In the "Summary of

Legal Restrictions Applicable to Boeing Sales Consultants" attached as an exhibit to the Sales Consultant Application signed by Sheikh Mahfouz and initialed by Bawazir, Boeing explained that it was "particularly important that Boeing sales consultants understand the legal restrictions contained in the U.S. Foreign Corrupt Practices Act and the U.S. Federal Trade Commission Order of 21 December 1978 concerning Boeing."

21. When Sheikh Mahfouz signed the Consultant Agreement, he consented to the burdens and benefits of United States and Washington State law in return for the right to act as Boeing's consultant.

22. Boeing also required the Bawazir/Mahfouz team to avoid any conduct that would create the appearance of impropriety. The Consultant Agreement states that "Consultant will not engage in conduct or activity that may raise questions as to Boeing's honesty, impartiality or reputation, or otherwise cause embarrassment to Boeing." Shortly after the 1992 Consultant Agreement was executed, the limits imposed by this provision were tested as Sheikh Mahfouz became entangled in civil and criminal litigation arising from his investment in and activities surrounding BCCI.

23. In July of 1991, a New York Grand Jury convened in the Supreme Court of the County of New York issued an indictment against BCCI, its affiliates and certain officers for fraud. The New York Grand Jury issued a similar indictment against Sheikh Mahfouz on July 1, 1992. Pursuant to the indictment, a warrant was issued for Sheikh Mahfouz's arrest. He refused to surrender for his arraignment. Other BCCI officers and directors had previously been indicted for alleged money laundering and securities law violations by a federal grand jury in Tampa, Florida.

24. In addition, Sheikh Mahfouz was named as a defendant in several civil lawsuits. In July of 1992, the U.S. Federal Reserve Board filed a civil complaint against Sheikh Mahfouz for violations of federal banking laws. On or about July 8, 1992, United States District Judge Kimba M. Wood of the Southern District of New York issued a temporary restraining order against Sheikh Mahfouz, prohibiting him from "withdrawing, transferring, removing, dissipating or disposing of assets or other property which he owns or controls . . . within the jurisdiction of the United States." Upon information and belief, Boeing was informed of this litigation against Sheikh Mahfouz and instructed that any proceeds from the Consultant Agreement would be subject to attachment to satisfy any judgments or penalties assessed against him.

25. Sheikh Mahfouz resigned from his position as a principal officer of NCB. As reported in *Moneyclips* (July 1992) and other news reports, he resigned his position because "he believes he must devote his full energies to vigorously fighting the proceedings in New York." Sheikh Mahfouz continued to be subject to criminal and civil prosecution until he entered into a settlement with U.S. authorities in December of 1993. Sheikh Mahfouz paid approximately $225 million to settle the claims against him. He also paid approximately $245 million to settle similar claims with European authorities.

26. The net effect of Sheikh Mahfouz becoming snarled in the BCCI scandal was twofold: first, his time and resources were consumed by the need to respond to the scandal and preserve his ability to operate lawfully in the international banking community. Indeed, a warrant for his arrest had been issued and Sheikh Mahfouz risked

arraignment if he visited U.S. soil. He therefore had diminished time to provide assistance to Boeing in the competition for the Saudia order; and, second, upon information and belief some, members of Boeing senior management were concerned Sheikh Mahfouz's involvement in the BCCI scandal might have a negative impact on Boeing's sale efforts in Saudi Arabia.

27. For a period of approximately two years, from March 1992 until May 1994, Sheikh Mahfouz had little contact with Boeing to provide assistance in the competition with Airbus and McDonnell Douglas. Bawazir became the primary contact with Boeing for the Mahfouz/Bawazir team during this period. It was during this two-year period that the jockeying for position among the aerospace giants was most intense; the battle was the most heated between the Europeans and Americans, so heated that it included as participants the heads of state from France, Great Britain and the United States; and that Boeing's success or failure in the competition was determined.

28. Under the terms of the Consultant Agreement, the Bawazir/Mahfouz team was to use its "best efforts" to promote the sale of Boeing aircraft; to "promptly inform Boeing whenever a Customer is interested in discussing the purchase of Aircraft"; and to "render such assistance as Boeing may reasonable require in concluding contracts for the sale of aircraft.

29. Bawazir provided a variety of services at Boeing's request. He gathered information about the activities of Saudia management as they assessed the strengths and weaknesses of competing aircraft, and suggested to Boeing the proper response to such information. Bawazir assisted Boeing in presenting technical and other information to decision makers in a manner consistent with Saudi

Arabia customs. He drafted letters and other information to be submitted to King Fahd, other members of the ruling family and other government entities. Indeed, Boeing authorized Bawazir to sign letters to King Fahd containing the terms on which Boeing would sell aircraft to Saudia. Bawazir devoted approximately 40 to 50 percent of his time during most of a six year period to Boeing's sales efforts. In contrast, Sheikh Mahfouz spent very little time assisting Boeing in its competition with Airbus and McDonnell Douglas.

30. In May 1993, Boeing renewed the Consultant Services Agreement for another year under substantially the same terms as the 1992 Consultant Agreement ("1993 Consultant Services Agreement). Sheikh Mahfouz signed the agreement. Bawazir initialed and signed each page of the Agreement. Bawazir is identified as a principal under the Agreement.

31. Shortly after the 1993 Consultant Services Agreement was executed, Sheikh Manfouz contacted Bawazir and asked him to inform Boeing that the contract should be terminated. Upon information and belief, Sheikh Mahfouz made this request for two reasons. First, he had little personal interest or time to devote to Boeing's competition with Airbus and McDonnell Douglas because his energy was directed to resolving the criminal and civil lawsuits filed against him arising from the BCCI scandal. Second, Sheikh Mahfouz had received pressure from a senior member of the Saudi Arabia Royal Family to withdraw so that another member of the Royal Family could assume the role as Boeing's consultant.

32. Bawazir informed Sheikh Mahfouz that he disagreed with the suggestion that the Consultant Services Agreement be cancelled. Cancellation of the contract would jeopardize Bawazir's right to be paid a share of the

sales commission due under the contract. In addition, Bawazir believed the cancellation of the contract was not in Boeing's interest given the critical juncture at which the competition had arrived.

33. Bawazir met with Boeing's Senior Vice President for International Sales, Bob George, to convey Sheikh Mahfouz's request. After repeating Sheikh Mahfouz's request that the Consultant Services Agreement be cancelled, Bawazir told George that accepting the request would weaken Boeing's efforts to sell aircraft to Saudia at a critical juncture in the competition. In addition, Bawazir he did not want to forfeit his rights to compensation under the Consultant Services Agreement. Consequently, Bawazir suggested that Boeing follow a course of action that would not insult or damage Boeing's relations with the Royal Family, while at the same time retaining the Bawazir/Mahfouz team as Boeing's consultant. Boeing accepted Bawazir's advice and followed it in a manner which preserved Boeing's chances of winning the Saudia contract and assured that the Bawazir/Mahfouz team would be paid a percentage commission should Saudia award a contract to Boeing.

34. Bawazir advised Boeing to meet with the member of the Saudi Arabia Royal Family who wanted to replace Sheikh Mahfouz, and request a consultant application to buy time so that he and Boeing could develop and implement a strategy for addressing the situation. Bawazir prepared a report and correspondence for Boeing that was submitted to a member of the Royal Family in a position to instruct Boeing on who it should retain as a consultant. After the report and correspondence was presented to that member of the Royal Family, the challenge to the Bawazir/Mahfouz team, and hence the danger to Boeing's sales efforts, was eliminated. By a

letter dated June 28, 1993, Bawazir transmitted a draft letter to Boeing through which Boeing informed the Royal Family member that it would not accept his consultant application, Upon information and belief, Boeing transmitted such a communication to the prospective applicant shortly after June 28, 1993.

35. Sheikh Mahfouz was not informed of Bawazir's efforts to save the Consultant Services Agreement with Boeing until after the strategy outlined by Bawazir had been successfully executed. Shortly after it became clear Boeing would retain the Bawazir/Mahfouz team despite Sheikh Mahfouz's wishes to the contrary, Bawazir informed Sheikh Mahfouz of his efforts. In that conversation, Bawazir reiterated his understanding that if Boeing was successful, the commission would be shared between Sheikh Mahfouz and Bawazir. Sheikh Mahfouz assented to this statement, and has never denied that Bawazir is entitled to share the commission despite several opportunities to do so during the last several years.

36. Throughout the six years the Bawazir/Mahfouz team acted as Boeing's Sales Consultant, Sheikh Mahfouz informed Boeing that Bawazir was to be the managing agent for the Bawazir/Mahfouz team. As early as March 3, 1992, Sheikh Mahfouz sent a letter to Boeing requesting that Boeing coordinate matters with Bawazir. Throughout the relationship, both before and after Sheikh Mahfouz entered into the Agreement with Boeing, Bawazir was Boeing's main contact in connection with performing services under the Agreement. Boeing routinely corresponded with Bawazir regarding communications on the potential Boeing contract. As late as August 20, 1996, Sheikh Mahfouz sent a letter to Boeing requesting that all correspondence be directed to the attention of Bawazir.

37. Boeing confirmed to the United States government Bawazir's important role in assisting in the commercial aircraft sales competition. In a letter dated September 15, 1993 to the United States Consulate General in Jeddah, Saudi Arabia, Boeing identified Bawazir as :

> A business associate of The Boeing Company who is directly assisting us in our campaign to sell Boeing commercial aircraft to Saudi Arabia. In this capacity, Boeing urgently requires him to be at the Company headquarters at Seattle, Washington beginning September 21, 1993.

38. Which company and country to award commercial aircraft sales contracts for Saudia was partly a political question to be decided by King Fahd in consultation with other members of the Royal Family and Saudia management. In part because the world pie for commercial aircraft business was shrinking, the potential Saudia order, and an order for military aircraft to be placed at about the same time, became a high stakes game of international diplomacy. France – the country where Airbus manufactures its aircraft – sent President Mitterand and its Prime Minister to meet with members of the Saudi Arabia Royal family. The British – whose British Aerospace was a partner in Airbus – sent Prime Minister John Major. Senior members of the Clinton Administration, including the late Commerce Secretary Ron Brown and President Clinton himself, met with Saudi Arabia leadership in an effort to bolster the cause of the two American manufacturers, Boeing and McDonnell Douglas.

39. The intelligence agencies of the competing countries also became involved in gathering information. According to *The Washington Post* newspaper, the U.S. Central Intelligence Agency and the National Security

Agency were used to "sniff out French bribes and generous financing terms" in an effort to sway Saudi Arabia decision-makers.

40. By approximately August 1993, King Fahd had decided to award the commercial aircraft contract to the American manufacturers. However, the allocation of the order between Boeing the McDonnell Douglas had yet to be decided. In addition, contracts could not be signed until suitable financing arrangements were made. A public announcement of the Saudi Arabia government's decision was to be deferred until an appropriate future date.

41. Nevertheless, on approximately August 18, 1993, Washington's U.S. Senator Patty Murray jumped the gun and announced that an order from Saudia had been secured for Boeing and McDonnell Douglas. Her announcement reflected the importance of the transaction to Washington State. Boeing and McDonnell Douglas responded to the announcement with statements reflecting their concern for its premature nature. Boeing stated through a spokesperson: "We did not make an announcement. We do not say anything until the customer does." McDonnell Douglas stated : "It's up to our customers to make an announcement, not us."

42. On February 16, 1994 President Clinton formally announced at the White House that the government of Saudi Arabia had decided to award the Saudia order to Boeing and McDonnell Douglas. Clinton was joined at the announcement by then-current Boeing Chairman and CEO, Frank Shrontz, and members of Washington's Congressional delegation. House Speaker Tom Foley, a congressman from Spokane, said "This is a great day for the country." President Clinton said : "This deal

will support tens of thousands of jobs not only in California and Washington, where the planes will be built, but in Missouri, Kansas, Arkansas, Utah and elsewhere, where Boeing and McDonnell Douglas have extensive operations."

43. While the political decision had been made, and announced, that Saudia would purchase commercial aircraft from the American companies, the financing details had yet to be worked out. Saudia did not have the resources to arrange private financing without government loan guarantees. At the same time, the Saudi Arabian government was unwilling to make such guarantees. Bawazir assisted Boeing in exploring financing options with local and international financial institutions.

44. By a letter to Sheikh Mahfouz dated May 5, 1994, Boeing requested the opportunity to meet with the Sheikh in the United States. The letter stated: "You are a very important consultant and with all respect, we feel a meeting at this phase of our sales effort with Saudia would be in our mutual interest." Sheikh Mahfouz was scheduled to be visiting his residence in Houston, Texas in approximately May 1994.

45. Beginning in approximately July of 1992, Sheikh Mahfouz had been unable to travel to the United States because he had been indicted by a New York Grand Jury investigating the BCCI scandal and a warrant had been issued for his arrest. According to *Forbes* Magazine, Sheikh Mahfouz refused to appear in New York to be fingerprinted, booked and jailed in connection with the indictment. Indeed, as reported in *Board of Governors of Federal Reserve System v. Mahfouz*, 1992 U.S. Dist. LEXIS 10866 (S.D.N.Y. July 23, 1992), Sheikh Mahfouz has "not surrendered for his arraignment."

Sheikh Mahfouz ultimately reached a settlement with U.S. authorities in December of 1993 after he agreed to pay approximately $225 million in fines and repayments to U.S. authorities. Vith the BCCI scandal behind him by May 1994, Sheikh Mahfouz could travel to his residence in Houston, and meet in Seattle with Boeing, not subject to any fears of arrest and incarceration.

46. Sheikh Mahfouz arrived at Boeing Field in Seattle on May 24, 1994. During his visit, he met with several members of Boeing's management team, including Frank Shrontz, Boeing's CEO and Chairman, Robert George, Vice President of International Business. In addition to a series of meeting to discuss the status of the Saudia transaction, Sheikh Mahfouz reportedly toured Boeing's 777 factory.

47. In a letter dated June 28, 1994 to Sheikh Mahfouz, Robert Geroge thanked Sheikh Mahfouz for his visit to Seattle. George wrote:

> As I am sure you know, the first 777 flew last week and it is now parked almost exactly where your plane stopped when you were here.
>
> I'd also like to take this opportunity to express our appreciation for the very excellent support, which Tahir is providing not only to me but also to our negotiation team. He is a real asset to all of us and a real pleasure to work with at all times.

48. In addition to signing and transmitting to Seattle the 1992 Consulting Agreement, in 1993, 1994, 1995 and 1996 Sheikh Manfouz signed and transmitted to Boeing in Seattle Consulting Agreements with terms of one year each.

49. The Consulting Agreements for each year were preceded by a consulting services application signed by Sheikh Mahfouz and transmitted to Seattle.

50. In approximately October 1995, Boeing signed contracts with Saudia for the future delivery of approximately $5.2 billion of commercial aircraft. In letters dated October 30 and 31, 1995, Sheikh Mahfouz and Bawazir each sent letters to Boeing's Chairman and CEO, Frank Shrontz, congratulating Boeing on the Saudia transaction.

51. Boeing in turn recognized the valuable services performed by Bawazir in connection with the successful sale of Boeing airplanes to Saudia. Shrontz sent a congratulatory letter dated January 12, 1996 to Sheikh Mahfouz and specifically thanking "Mr. Bawazir for his role in assisting the Boeing team in all aspects of the transaction."

52. In a separate letter dated January 12, 1996 to Bawazir from Shrontz, Shrontz stated:

> Throughout the Saudia campaign, Bob [George] consistently reported to me how helpful you were in all phases leading up to the signature of the contract. It is most appropriate that we extend to you a very large expression of appreciation of your efforts on our behalf. You can take great pride in having been a major contributor.

53. On April 20, 1996, Sheikh Mahfouz sent a letter to Boeing requesting that it make commission payments to a special account opened by Bawazir in Sheikh Mahfouz's name at NCB ("Special Project Account"). In addition, Boeing has transmitted a commission payment of approximately $2.6 million by check made out to Sheikh Mahfouz. The check was sent by Boeing to Bawazir, and deposited in the Special Project Account.

54. On approximately August 21, 1997, Boeing transmitted a commission payment of approximately $6.8 million to Bawazir. However, unlike the previous com-

mission payments, the check was made out in Bawazir and not Sheikh Mahfouz's name. The description on the check stated: "Commission on advance payments received . . . in accordance with Agreement Number 6-1427-10B-1005/9.25 [the Consultant Services Agreement]." Bawazir nevertheless deposited these funds in the Special Boeing Account, despite Sheikh Mahfouz's reluctance to pay Bawazir the share of commission he was owed.

55. In a letter dated November 30, 1997 to the Boeing Company, Sheikh Mahfouz wrote that "[E]ffective as of the date of this letter, Mr. Tahir Mohammed Bawazir, who has served as my representative in my business dealings with your company, is no longer authorized by me to serve as my representative in such capacity with Boeing . . . " Sheikh Mahfouz was apparently unaware of to whom at Boeing he should sent the letter. He therefore addressed the letter generically to:

> The Chairman
> Boeing Company
> Seattle, Washington
> United States of America

The letter went on to state that "all future commission checks be made directly payable me; that is, that the payee of such checks will be Kahlid Salem Bin Mahfooz [sic]."

56. Sheikh Mahfouz did not provide a copy of the November 30, 1997 letter to Bawazir. However, a copy of the letter was provided to him by the Boeing Company. By a letter dated December 8, 1997 to Sheikh Mahfouz, Bawazir stated:

> As you are well aware . . . our agreement with Boeing Commercial Airplane Group has already

expired and [Boeing's] Mr. Abdul Hamid al-Zeghmi has on my follow-up advised me by phone that Boeing will not renew the agreement.

57. Bawazir reminded Sheikh Mahfouz in the December 8 letter that "the payments for commission payable on the Saudia aircraft purchase contract are solely due to the consultancy services already performed by me in the most satisfactory manner to Boeing on your behalf as testified by the highest levels in Boeing Company."

58. Bawazir concluded the letter by requesting Sheikh Mahfouz to arrange for payment of commissions due to Barazir and for Sheikh Mahfouz's "written confirmation of the arrangements for all future receipts of commission already due under the agreement and it's distribution in accordance with established basis."

59. By letter addressed to Sheikh Mahfouz dated December 18, 1997, Boeing's Vice President of International Sales, M.S. Belyamani, stated that the Consultant Services Agreement between the Boeing Company and Sheikh Mahfouz expired May 18,. 1997. Mr. Belyamani confirmed that "Boeing's payment obligations under this agreement, as a result of the sale of 747 and 777 aircraft to Saudia will, of course, remain in full force and effect."

60. Despite numerous requests, Sheikh Mahfouz has refused to share the commission payments owed to Bawazir. Boeing has neither paid Bawazir compensation for his assistance in securing the Saudia order, nor has it taken steps to ensure that Bawazir is compensated from the commission payments to Sheikh Mahfouz.

FIRST CAUSE OF ACTION
BOEING'S BREACH OF THIRD-PARTY AGREEMENT

61. Bawazir incorporates by reference the allegations in paragraphs 1 through 60 of the Complaint.

62. Boeing and Sheikh Mahfouz are parties to the Consultant Services Agreement that provides for the payment of commissions by Boeing in return for assistance from Sheikh Mahfouz and Bawazir in procuring the sale of commercial aircraft to Saudia Airlines.

63. Boeing and Sheikh Mahfouz intended that Bawazir would assist Boeing in procuring the sale to Saudia, and that he would benefit from and receive compensation by way of the commissions Boeing would pay Sheikh Mahfouz under the terms of the Consultant Services Agreement.

64. Bawazir was not made a party to the Consultant Services Agreement. Bawazir was an intended third-party beneficiary to the contract.

65. In reliance upon the agreement between Boeing and Sheikh Mahfouz, Bawazir provided valuable services to Boeing.

66. Boeing benefited from Bawazir's services. On several occasions, Boeing explicitly acknowledged the importance of Bawazir's efforts in Boeing obtaining the Saudia Airlines contract.

67. Boeing's payments of commissions to Sheikh Mahfouz under the terms of the Consultant Services Agreement were to necessarily and directly benefit Bawazir, and to compensate Bawazir for his efforts on Boeing's behalf.

68. Boeing has failed to make commission payments in a manner ensuring that Bawazir receive the compen-

sation to which he is entitled as a third-party beneficiary to the Consultant Services Agreement.

69. Bawazir is entitled to money damages resulting from Boeing's breach of its agreement with Sheikh Mahfouz for the benefit of Bawazir.

SECOND CAUSE OF ACTION

SHEIKH MAHFOUZ'S BREACH OF THIRD-PARTY AGREEMENT

70. Bawazir incorporates by reference the allegations in paragraphs 1 through 69 of the Complaint.

71. Boeing and Sheikh Mahfouz are parties to the Consultant Services Agreement that provides for the payment of commissions by Boeing in return for assistance from Sheikh Mahfouz and Bawazir in procuring the sale of commercial aircraft to Saudia Airlines.

72. Sheikh Mahfouz and Boeing intended that Bawazir would assist Boeing in procuring the sale to Saudia, and that he would benefit from and receive compensation by way of the commissions Boeing would pay Sheikh Mahfouz under the terms of the Consultant Services Agreement.

73. Bawazir was not made a party to the Consultant Services Agreement. Bawazir was an intended third-party beneficiary to the contract.

74. In reliance upon the agreement between Boeing and Sheikh Mahfouz, Bawazir provided valuable services to Boeing.

75. Sheikh Mahfouz benefited from Bawazir's services, and has received payment from Boeing of commissions resulting from these services.

76. Sheikh Mahfouz has breached his agreement to compensate Bawazir as a third-party beneficiary.

77. Bawazir is entitled to money damages resulting from Sheikh Mahfouz's breach of its agreement with Boeing for the benefit of Bawazir.

THIRD CAUSE OF ACTION

BOEING'S BREACH OF IMPLIED CONTRACT

78. Bawazir incorporates by reference the allegations in paragraphs 1 through 77 of the Complaint.

79. Bawazir assisted Boeing during the four-year period to secure a contract for the sale of commercial aircraft to Saudia Airlines.

80. Boeing understood and agreed that Bawazir did not provide these services as a volunteer and that he would receive compensation for these services.

81. Boeing was successful in obtaining a contract to sell approximately $5.2 billion of commericial aircraft to Saudia and has acknowledged the value and importance of the assistance provided by Bawazir. Boeing has been unjustly enriched at Bawazir's expense because it has received the benefits of Bawazir's efforts without providing compensation to him.

82. Boeing's conduct, and Bawazir's conduct in reliance upon it, gives rise to an implied contract between Boeing and Bawazir. Under that implied contract, Bawazir is entitled to compensation for his successful efforts on behalf of Boeing.

83. Bawazir's compensation under the implied contract with Boeing should be based on the reasonable value of the services provided to Boeing, determined in accordance with similar agreements Boeing has entered with other parties such as Sheikh Mahfouz.

84. Boeing has breached its implied agreement with Bawazir by failing to make commission payments in the manner ensuring that Bawazir will receive the compensation to which he is entitled.

85. Bawazir is entitled to money damages equal to the reasonable value of services he provided to Boeing.

FOURTH CAUSE OF ACTION

SHEIKH MAHFOUZ'S BREACH OF CONTRACT

86. Bawazir incorporates by reference the allegations in paragraphs 1 through 85 of the Complaint.

87. Sheikh Mahfouz and Bawazir agreed that Bawazir would act as the management agent and otherwise take the lead inproviding services to Boeing under the Consultant Services Agreement.

88. Bawazir and Sheikh Mahfouz understood that under the terms of the Consultant Services Agreement, Boeing would not be required to pay the Bawazir/Sheikh Mahfouz team unless its efforts to sell commercial aircraft to Saudia Airlines was successful. Sheikh Mahfouz and Bawazir also understood that Bawazir was undertaking to provide substantial time and effort over a multi-year period to fulfill Sheikh Mahfouz's obligations under the terms of the Consultant Services Agreement.

89. Sheikh Mahfouz and Bawazir agreed that Bawazir would be compensated for his efforts to fulfill Sheikh Mahfouz's obligations under the Consultant Services Agreement through a sharing of any commission payments that were made pursuant to it.

90. Bawazir met his obligations under the Agreement with Sheikh Mahfouz. Bawazir successfully provided the services Sheikh Mahfouz was obligated to provide Boeing under the terms of the Consultant Services Agreement.

91. Sheikh Mahfouz has breached his agreement with Bawazir by refusing to share the commission payments Boeing has made to Sheikh Mahfouz.

92. Bawazir has been damaged by Sheikh Mahfouz's breach of his agreement with Bawazir. Bawazir is entitled to recover his share of the commission payments Boeing has to date made to Sheikh Mahfouz, and his share of future commission payments that Boeing is obligated to make under the terms of the Consultant Services Agreement.

FIFTH CAUSE OF ACTION

SHEIKH MAHFOUZ'S UNJUST ENRICHMENT

93. Bawazir incorporates by reference the allegations in paragraphs 1 through 92 of the Complaint.

94. Sheikh Mahfouz requested Bawazir to fulfill Sheikh Mahfouz's obligations under the Consultant Services Agreement.

95. Bawazir performed valuable services on Sheikh Mahfouz's behalf to Boeing under the Agreement.

96. Sheikh Mahfouz accepted, relied upon and benefited from Bawazir's services and advice throughout Boeing's efforts to win the Saudia contract.

97. Bawazir did not act as a volunteer, and fully expected to be paid a share of the commissions due under the Consultant Services Agreement.

98. Sheikh Mahfouz has received payments from Boeing and is scheduled to receive additional payments under the terms of the Consultant Services Agreement. Without Bawazir's efforts, Sheikh Mahfouz would not have received these payments.

99. Bawazir has not been compensated for his efforts.

100. Sheikh Mahfouz has been unjustly enriched by refusing to pay Bawazir for the value of his services.

101. Bawazir is entitled to money damages, equal to the reasonable value of the services he performed to Sheikh Mahfouz.

SIXTH CAUSE OF ACTION

BOEING'S UNJUST ENRICHMENT

102. Bawazir incorporates by reference the allegations in paragraphs 1 through 101 of the Complaint.

103. Bawazir performed valuable services on behalf of Boeing, which Boeing recognized were instrumental to its success in obtaining the approximately $5.2 billion contract for the sale of commercial aircraft to Saudia Airlines.

104. Boeing accepted, relied upon and benefited from Bawazir's services and advice throughout Boeing's efforts to win the Saudia contract.

105. Bawazir did not act as a volunteer, and fully expected to be paid for the value of his services.

106. Bawazir has not been compensated for the services he provided to Boeing in its effort to obtain the Saudia contract.

107. Boeing has been unjustly enriched by failing to provide that Bawazir is compensated for the value of his services.

108. Bawazir is entitled to money damages, equal to the reasonable value of the services he performed on Boeing's behalf.

SEVENTH CAUSE OF ACTION

RESTITUTION FROM SHEIKH MAHFOUZ

109. Bawazir incorporates by reference the allegations in paragraphs 1 through 108 of the Complaint.

110. Sheikh Mahfouz requested Bawazir to meet Sheikh Mahfouz's obligations under the Consultant Services Agreement.

111. Bawazir performed valuable services to Boeing under the Agreement, which Boeing recognized were instrumental in Boeing obtaining the $5.2 billion sales contract with Saudia Airlines.

112. As a result of Bawazir's services, Boeing obtained the Saudia Airlines contract, and Sheikh Mahfouz is entitled to a share of the commissions under the Agreement.

113. Bawazir invested considerable time to assist Boeing and Sheikh Mahfouz in obtaining the Saudia Airlines contract.

113. Bawazir invested considerable time to assist Boeing and Sheikh Mahfouz in obtaining the Saudia Airlines contract.

114. Bawazir did not act as a volunteer, and fully expected to be paid for the value of his services.

115. Sheikh Mahfouz has refused to compensate Bawazir for his efforts on Sheikh Mahfouz's behalf.

116. Bawazir is entitled to money damages, equal to the value of the services he performed.

EIGHTH CAUSE OF ACTION

RESTITUTION FROM BOEING

117. Bawazir incorporates by reference the allegations in paragraphs 1 through 116 of the Complaint.

118. Bawazir performed valuable services for Boeing, which Boeing recognized were instrumental to it obtaining a $5.2 billion sales contract with Saudia Airlines.

119. Bawazir invested considerable time to assist Boeing in obtaining the Saudia contract. Bawazir has received no compensation for his efforts on behalf of Boeing.

120. Bawazir is entitled to money damages equal to the value of services he performed in assisting Boeing to obtain the Saudia contract.

NINTH CAUSE OF ACTION

BREACH OF JOINT VENTURE AGREEMENT AND ACCOUNTING

121. Bawazir incorporates by reference the allegations in paragraphs 1 through 120 of the Complaint.

122. Bawazir and Sheikh Mahfouz formed a joint venture to pursue a consulting agreement with Boeing and subsequently to provide services under that agreement.

123. Sheikh Mahfouz represented to Boeing that Bawazir would provide substantial services required by Boeing under that Agreement. However, Sheikh Mahfouz would be the principal signing the agreement with Boeing.

124. Sheikh Mahfouz and Bawazir were successful in convincing Boeing to enter a Consultant Services Agreement with their joint venture. Under the terms of the Consultant Services Agreement, the joint venture was to

be paid a commission if Boeing was successful in entering a contract with Saudia Airlines and it actually delivered airplanes to that company. The joint venture was to receive as a commission a percent of the value of the commercial aircraft actually delivered to Saudia.

125. Sheikh Mahfouz agreed that Bawazir would be the managing agent of the joint venture. He informed Boeing that it should make all contacts and communications with the joint venture through Bawazir.

126. Bawazir provided substantially all services called for by the Consultant Services Agreement on behalf of the joint venture. Bawazir succeeded in saving the Consultant Services Agreement for the benefit of the joint venture when Sheikh Mahfouz had asked that the agreement be terminated.

127. Boeing has acknowledged Bawazir's importance to its success in selling commercial aircraft to Saudia.

128. In furtherance of the joint venture agreement, Bawazir established a special account at the bank owned by Sheikh Mahfouz, the National Commerce Bank in Saudi Arabia, for deposit of commission payments by Boeing to the joint venture.

129. More than $15 million in commission payments have been deposited into the special joint venture bank account.

130. To date, however, Sheikh Mahfouz has refused to provide Bawazir with any of the compensation to which he is entitled under the joint venture agreement.

131. Bawazir is entitled to damages for breach of the joint venture agreement, the appointment of a receiver to collect future commission payments and an accounting for his share of the commission payments to and on behalf of the joint venture.

RELIEF REQUESTED

Bawazir requests the following relief from this Court:

1. A declaratory judgment that Bawazir is entitled to reasonable compensation for services performed as specified under the Consultant Services Agreement.

2. Judgment against Boeing for actual damages and prejudgment interest in an amount to be proven as trial;

3. Judgment against Mahfouz for actual damages and prejudgment interest in an amount to be proven as trial;

4. Such other relief as appears to the Court to be just and equitable; and

5. Bawazir's costs, expenses and attorneys' fees, as provided by law.

DATED THIS 15th day of June 1998.

FOSTER PEPPER & SHEFELMAN PLLC

/s/ Michael Vaska
Charles P. Nomellini, WSBA #3882
Michael K. Vaska, WSBA #15438
David Dadoun, WSBA #23948
Attorneys for Plaintiff

FOSTER PEPPER & SHEFELMAN PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299

APPENDIX E

[Filed AUG 14 1998]

The Honorable Jim Bates

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

No. 98-2-14646-OSEA

TAHIR M. BAWAZIR,

Plaintiff,

v.

THE BOEING COMPANY, a Delaware corporation; and SHEIKH KHALID BIN MAHFOUZ,

Defendants.

DECLARATION OF DAVID J. DADOUN IN SUPPORT OF PLAINTIFF'S MEMORANDUM IN OPPOSITION TO KHALID BIN MAHFOUZ'S MOTION TO DISMISS

DAVID J. DADOUN declares as follows:

1. I am an attorney for plaintiff Tahir Bawazir. I am competent to testify and have personal knowledge regarding the following.

2. Attached as Exhibit 1 is a true and correct copy of the indictment against Khalid Bin Mahfouz ("Mahfouz") by the People to the State of New York issued in July 1992.

3. Attached as Exhibit 2 is a true and correct copy of the complaint filed on July 6, 1992 in the civil action filed in the U.S. District Court, Southern District of New York, *Board of Governors of the Federal Reserve System v. Khalid bin Mahfouz,* Civil Action No. 92civ5096.

4. Attached as Exhibit 3 is a true and correct copy of a July 8, 1992 news article from *Moneyclips* headlined "Khalid bin Mahfouz quits NCB".

5. Attached as Exhibit 4 is a true and correct copy of a July 8, 1992 news article from the *Financial Times* headlined "Saudi banker in BCCI case quits".

6. Attached as Exhibit 5 is a true and correct copy of the court opinion and ruling regarding the temporary restraining order filed in *BCCI Holdings vs. Sheikh Khalid bin Mahfouz,* 1992 U.S. Dist. LEXIS 18834 (December 10, 1992) filed in the U.S. District Court for the District of Columbia, Civil Action No. 92-2763.

7. Attached as Exhibit 6 is a true and correct copy of documentation pertaining to the master license for Plymouth Holdings, Ltd., doing business as Newport Motor Company.

8. Attached as Exhibit 7 is a true and correct copy of documentation pertaining to the master license for Cheyenne Holdings, Inc., doing business as Hoyt's.

9. Attached as Exhibit 8 is a true and correct copy of a July 16, 1998 letter from Kari Anne Smith, counsel for Boeing, to Charles Nomellini, Michael Vaska and David Dadoun.

10. Attached as Exhibit 9 is a true and correct copy of a July 15, 1998 final stipulation regarding the first amended complaint.

11. Attached as Exhibit 10 is a true and correct copy of a U.S. Department of State report entitled "Saudi Arabia Country Report on Human Rights Practices for 1997", released January 30, 1998 by the Bureau of Democracy, Human Rights and Labor.

12. Attached as Exhibit 11 is a true and corret copy of a September 1997 news article from *Euromoney* headlined "Good times hit the Gulf" (Mahfouz resumes control of NCB).

13. Mahfouz was served with a summons and complaint in the lawsuit in California on May 13, 1998. This occurred after a week-long stakeout at his hotel in Los Angeles. Mahfouz reportedly was accompanied by security at the time he was served.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed in Seattle, Washington this 14th day of August 1998.

/s/ David J. Dadoun
DAVID J. DADOUN

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-2763 (JHG)

BCCI HOLDINGS (LUXEMBOURG),
SOCIETE ANONYME, et al.,

Plaintiffs,

v.

SHEIKH KHALID BIN MAHFOUZ, et al.,

Defendants.

December 10, 1992, Decided

JUDGES. GREEN

OPINION BY: JOYCE HENS GREEN

OPINION: TEMPORARY RESTRAINING ORDER

Upon consideration of the ex parte Motion for Temporary Restraining Order of the Court Appointed Fiduciaries of BCCI Holdings (Luxembourg) S.A., Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Company Overseas Limited, the Complaint, the Affidavit of Howard B. Dyson with the exhibits attached thereto, and the accompanying Memorandum of Law, the Court is satisfied that there is good cause for the issuance of this Temporary Restraining Order without prior notice to the defendants, essentially for the reasons stated in those documents, pleadings, and the lengthy oral recitation of the plaintiffs' position made in court on December 9, 1992.

In short, the Court is satisfied that plaintiffs have demonstrated (1) a substantial likelihood of success on the merits; (2) that irreparable injury will result in the absence of the requested relief; (3) that no other parties will be harmed if temporary relief is granted; and (4) that the public interest favors entry of a temporary restraining order. See *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).* In addition, for the reasons shown by the plaintiffs in their motion for a temporary restraining order, in the affidavit and exhibits attached to the motion, and in open court, it clearly appears that immediate and irreparable injury, loss, or damage would have resulted to the plaintiffs if ex parte relief were not granted. The affidavit and attached exhibits filed with the Court allege the defendants' mastery of manipulating financial transactions in furtherance of fraud and concealment of funds and, therefore, a substantial portion of the defendants' assets to which plaintiffs lay claim could likely be almost instantaneously removed, through electronic transfer, from the United States and secreted in Saudi Arabia or any number of other jurisdictions. Additionally, the individual defendants have been indicted in New York County but are fugitives from justice. It is further alleged that the defendants have not answered administrative charges brought by the Board of Governors of the Federal Reserve System. Had the plaintiffs or the Court given defendants notice of the hearing on plaintiffs' motion for a temporary restraining order, it appears very likely that before a ruling could be issued, defendants would have transferred assets from the United States to foreign jurisdictions not providing full faith and credit to orders of United States courts. Consequently, denying plaintiffs' request for an ex parte hearing would likely prevent the enforceability of a judgment, if any, issued against the defendants, thereby making plaintiffs' suit futile.

Accordingly, and pursuant to Rule 65 of the Federal Rules of Civil Procedure, it is hereby

ORDERED that Khalid Bin Mahfouz and Haroon Rashid Kahlon shall be and are hereby restrained from withdrawing, transferring, removing, dissipating, or disposing of funds, assets or other property located within the jurisdiction of the United States which they either own or control, directly or indirectly. It is

FURTHER ORDERED that

(a) Any employee and/or agent of Khalid Bin Mahfouz and/or Haroon Rashid Kahlon and any corporation and any entity owned and/or controlled by Khalid Bin Mahfouz and/or Haroon Rashid Kahlon, including but not limited to those entities listed on the "Schedule of Companies" attached hereto; and

(b) Any individual and/or entity acting for and/or in concert and/or participation with Khalid Bin Mahfouz and/or Haroon Rashid Kahlon, their employees and/or agents and any corporation and/or any entity owned and/or controlled by either or both of them, including, but not limited to those entities listed on the "Schedule of Companies" attached hereto

shall be and hereby are restrained from withdrawing, transferring, removing, dissipating, or disposing of any funds, assets or other property located within the jurisdiction of the United States, owned or controlled either directly or indirectly by Khalid Bin Mahfouz and/or Haroon Rashid Kahlon, and from transferring, removing or disposing of any funds, assets or other property located within the jurisdiction of the United States in any way which would directly or indirectly benefit Khalid

Bin Mahfouz and/or Haroon Rashid Kahlon, provided that these individuals or entities receive actual notice of the Order by personal service or otherwise. It is

FURTHER ORDERED that any of the funds, assets or other property located within the jurisdiction of the United States

(a) In the possession and/or control of Khalid Bin Mahfouz and/or Haroon Rashid Kahlon;

(b) In the possession and/or control of any employee and/or agent of Khalid Bin Mahfouz and/or Haroon Rashid Kahlon and/or of any corporation and/or entity owned and/or controlled by Khalid Bin Mahfouz and/or Haroon Rashid Kahlon, including but not limited to those entities listed on the "Schedule of Companies" attached hereto; and/or

(c) In the possession and/or control of any individual and/or entity acting for or in concert with Khalid Bin Mahfouz and/or Haroon Rashid Kahlon, their employees and/or agents and/or any corporation and/or business owned and/or controlled by either of them, including but not limited to those entities listed on the "Schedule of Companies" attached hereto,

shall be and hereby are restrained from being withdrawn, transferred, removed, disposed of, or dissipated by any individual and/or entity with actual notice of this Order. It is

FURTHER ORDERED that this Temporary Restraining Order shall become effective upon the posting of security in the sum of $20,000 in the form of either cash, personal check, certified check, cashier's check, or bond with the Clerk of the Court, to be accomplished on or before December 10, 1992 at 10:00 a.m. failing which this Temporary Restraining Order shall stand immediately dissolved. It is

FURTHER ORDERED that this Order is binding upon the parties to this action, their officers, agents, servants, employees and attorneys and upon persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise. It is

FURTHER ORDERED that this Temporary Restraining Order shall expire on December 18, 1992 at 1:30 p.m. unless earlier extended for good cause shown. It is

FURTHER ORDERED that this Court shall hear argument on December 22, 1992 at 1:30 p.m. in Courtroom 18 as to whether a preliminary injunction should issue in this action. Plaintiffs shall file their Motion for Preliminary Injunction on or before 11:00 a.m. on December 14, 1992. Defendants Mahfouz and Kahlon shall respond on or before 11:00 a.m. on December 21, 1992. Plaintiffs shall reply on or before 11:00 a.m. on December 22, 1992. Service of the pleadings shall be made in all instances by the swiftest means. It is

FURTHER ORDERED that service of this Order shall be made by the swiftest means and in any event on or before December 11, 1992 at 9:30 a.m. It is

FURTHER ORDERED that all matters in this action filed under seal on December 9, 1992 shall be unsealed forthwith.

IT IS SO ORDERED.
December 10, 1992
Time Issued: 9:00 a.m.

JOYCE HENS GREEN
UNITED STATES DISTRICT JUDGE

– SCHEDULE OF COMPANIES –

Apache Holdings Limited
Zandi Holdings Limited
Zendi Holdings Limited
Rosemond Holdings Limited
Cheyenne Holdings Limited
Mohawk Holdings Limited
Nimir Holdings Limited
Plymouth Holdings Limited
Blue Velvet Corporation
Hirondel Trust
K.B. Mahfouz Limited
Topaz Investments Limited
Connaught Place Investments Lim
Middle East Finance Group
KBM Investments N.V.
KBM Investments Corporation

* * *

APPENDIX F

43375-0-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

TAHIR M. BAWAZIR,

Appellant,

v.

THE BOEING COMPANY
and SHEIKH KHALID BIN MAHFOUZ,

Respondents.

BRIEF OF RESPONDENT THE BOEING COMPANY

David J. Burman, WSBA #10611
Kari Anne Smith, WSBA #23204
Attorneys for Respondent
The Boeing Company

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M. Martha Ries
Of Counsel
THE BOEING COMPANY

* * *

[3] III. STATEMENT OF THE CASE[1]

In March 1992, Boeing and Mahfouz executed a one-year Consultant Services Agreement. CP 10 [Complaint] at ¶16. Similar agreements (collectively, the "Agreement") were executed in 1993, 1994, 1995, and 1996. CP 14, 19 [Complaint] at ¶¶30, 48.[2]

Bawazir's Complaint acknowledges that "Boeing and Sheikh Mahfouz are parties to the Consultant Services Agreement" and that "Bawazir was not made a party to the Consultant Services Agreement." CP 22 [Complaint] at ¶¶62, 64. Moreover, Bawazir was not a signatory to the Agreement. CP 11, 19 [Complaint] at ¶¶17, 48. Rather, Mahfouz was identified as the sole "Consultant" in the Agreement, "and he signed the 1992 Agreement and all subsequent versions of it in later years." CP 616 [Agreement] (defining Mahfouz as "Consultant"); CP 11 [Complaint] at ¶17. *See also* Appellant's Brief at 28 (Bawazir refers to "Boeing's employment of Sheikh Mahfouz [not Bawazir] under the Agreements"); *id.* at 30 ("From 1992 through 1997, Sheikh Mahfouz [not * * *

---

[1] Contrary to Bawazir's assertions, Boeing did not dispute the factual allegations set forth in the Complaint for purposes of its motion to dismiss. The *only* dispute, as set forth in Boeing's Argument below, is the legal effect of the alleged facts. Settled law mandated that the trial court dismiss Bawazir's claims against Boeing.

[2] The Agreement's specific terms are confidential, and it was filed under seal in the trial court. *See* CP 614-72 [1992-1996

[footnote continued]

Agreements]. Bawazir's claims are based on the Agreement, and the trial court properly considered it in ruling on Boeing's motion to dismiss, even if it is "outside the pleadings." *See Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 121, 774 P.2d 1032 (1987) (trial judge may consider "matters outside the pleadings to enable him to understand the context of the CR 12 motion so as to rule on it as a matter of law, without reaching or resolving any factual dispute"); *see also Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993) ("a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document").

* * *

Supreme Court, U.S.
FILED

JAN 29 2001

CLERK

③

No. 00-1102

In The

Supreme Court of the United States

◆

TAHIR M. BAWAZIR,

Petitioner,

v.

SHEIKH KHALID BIN MAHFOUZ,

Respondent.

◆

On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Washington

◆

RESPONDENT'S BRIEF IN OPPOSITION

◆

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OPINIONS BELOW

Respondent Sheikh Khalid Bin Mahfouz ("Mahfouz" or "Respondent") concurs with the recitations set forth by Petitioner Tahir M. Bawazir ("Bawazir" or "Petitioner") with the exception of the allegation that "Sheikh Mahfouz disputed many facts alleged in the complaint. . . . " Pet. at 1. To the contrary, Mahfouz assumed the factual allegations in the complaint in urging to both the trial court and the Court of Appeals that there is no jurisdiction in Washington State over any dispute between Bawazir and Mahfouz. *See* Ct. App. Op. at 1 and 18; Petitioner's Appendix ("P. App.") at 4a and 19a.

Mahfouz further concurs that neither the trial court opinion nor the opinion of the Court of Appeals was published, the Court of Appeals having determined that the appellate questions presented lacked sufficient precedential value to be published as an opinion of the Court, RCW 2.06.040.[1]

◆

STATEMENT OF THE CASE

A. Overview

Mahfouz disagrees with Petitioner's overview of the case, insofar as such recitation includes multiple arguments and legal conclusions.

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[1] The following is stamped on the Court's opinion mailed to counsel of record:

> A majority of the panel has determined that this opinion will not be printed . . . but will be filed for public record pursuant to RCW 2.06.040.

B. The Facts Set Forth in the Amended Complaint Establish the Factual Record

This case centers on Saudi Arabian transactions, witnesses, and evidence. Bawazir is a resident of Saudi Arabia, though he maintains citizenship in the Republic of Yemen. Mahfouz is a leading Saudi Arabian Banker and businessman and is a citizen and resident of the Kingdom of Saudi Arabia. The case arises out of sales of aircraft by The Boeing Company ("Boeing") to Saudia Airlines ("Saudia"), the national airline of Saudi Arabia. Bawazir's claim is that, based on work he performed in Saudi Arabia, he is entitled to an unspecified share of commissions Boeing paid Mahfouz in connection with the sales.

The Complaint[2] alleges that in 1991 Boeing approached Mahfouz to discuss a consulting relationship in connection with the planned sale of aircraft to Saudi Arabia. ¶¶ 10-11. Boeing "solicit[ed]" Mahfouz and other possible consultants. ¶ 11. The Complaint does not allege that any of these contacts or meetings occurred in the State of Washington.

In March 1992, Mahfouz and Boeing executed the first of a series of Consultant Services Agreements. ¶ 20. Similar versions were executed in 1993, 1994, 1995, and 1996. ¶¶ 30, 48. Under the Agreement, Mahfouz pledged to render consulting services to Boeing, and Boeing promised to pay Mahfouz a commission on aircraft sales to Saudi Arabia or Yemen upon delivery of the aircraft. ¶ 18.

---

[2] The "Complaint" in this section refers to Bawazir's First Amended Complaint, a copy of which is included in P. App. at 30a-60a.

The Complaint concedes that Boeing and Mahfouz were the *sole* parties to the Agreement and that "Bawazir was not made a party to the Consultant Services Agreement." Complaint ¶¶ 62, 64. Nor was Bawazir a signatory to any of the agreements. ¶¶ 17, 48. Rather, Mahfouz was identified as the only person to whom Boeing had any payment obligations, and Mahfouz "signed the 1992 Consultant Agreement and all subsequent versions of it in later years." ¶ 17.

The Complaint alleges that in a 1993 oral conversation – more than a year after Mahfouz's consulting services began – "Bawazir reiterated his understanding that if Boeing was successful, the commission would be shared between Sheikh Mahfouz and Bawazir. Sheikh Mahfouz assented to this statement, and has never denied that Bawazir is entitled to share the commission despite several opportunities to do so during the last several years." Complaint ¶ 35.

In October 1995, Boeing executed contracts with Saudia for the future delivery of commercial aircraft worth approximately $5.2 billion. Complaint ¶ 50. In April 1996, Boeing sent Bawazir a commission check for $2.6 million made out to Mahfouz, and Bawazir deposited it in Mahfouz's account at NCB. ¶ 53. In August 1997, Boeing sent Bawazir a check made out to Bawazir, not Mahfouz, in the amount of approximately $6.8 million. Bawazir deposited this check in Mahfouz's account at NCB as well. ¶ 54.

Mahfouz wrote Boeing on November 30, 1997, stating that Bawazir, "who has served as my representative in my business dealings with your company, is no longer authorized by me to serve as my representative in such capacity with Boeing[.]" ¶ 55.

C. Petitioner's Misstatements

Mahfouz believes the following contentions in Petitioner's Statement of the Case are misstatements:

- Bawazir states at 5 that "his family maintained a residence in Washington state. . . . " This is based solely on the Declaration of Tahir M. Bawazir ("Bawazir Decl. (under seal)"). At paragraph 3 of this declaration, Bawazir asserts that Mahfouz "travels regularly to Houston to reside in his home there. It is also my understanding that at some point in the 1990's, his family maintained a residence in the Seattle area." This is a hearsay declaration with no factual assertion that Mahfouz personally owned or occupied any residence in Washington State at any time.

- Bawazir contends at 5 that Mahfouz "is believed to own several businesses in Washington State." This is based solely upon the declaration of one of Bawazir's counsel of record, which references two Washington corporations having similar names to companies subject to a TRO entered against Mahfouz in BCCI, *see* Dadoun Declaration, § 6-8 P. App. at 62a, 69a. Exhibits 6 and 7 of Mr. Dadoun's declaration are not included in

Petitioner's Appendix. They are included in Respondent's Appendix.[3]

- Bawazir contends at 6 that Mahfouz, for decades, has conducted business with The Frank Russell Company, which is headquartered in Tacoma, Washington. This is based upon the Bawazir Decl. (under seal) at §§ 30-32. Exhibits 22-25 to this declaration establish clearly that the National Commerce Bank ("NBC"), not Mahfouz individually, had a consulting relationship with The Frank Russell Company.

- Bawazir contends at 7 that the consulting agreements "were governed by Washington law." This is misleading in that the Agreements, while calling for the application of Washington law, expressly provided disputes be resolved by arbitration in Geneva, Switzerland, in accordance with the Rules of the International Chamber of Commerce. Bawazir Decl. (under seal), Ex. 16 at 8.

- Bawazir references the BCCI matter at 9 and footnote 7. This effort is an attempt to dredge up irrelevant and defamatory reference to the BCCI affair, now almost a decade old. In that case, NBC and Mahfouz were not treated as alter egos, and neither NBC nor Mahfouz was convicted or admitted any wrongdoing. Civil litigation against Mahfouz was dismissed five years ago under the *forum non conveniens* doctrine. *See,* BCCI Holdings (Lux.) v. Mahfouz, 828 F. Supp. 92, 100 (D.D.C. 1993).

---

[3] *See* Respondent's Appendix ("R. App.") at App. 4-9. There is no evidence that they are the same companies. Indeed, Plymouth Holdings, Ltd., is a Washington corporation doing business as Newport Motor Corporation. It was not even incorporated until June 10, 1993, after the TRO was issued against Mahfouz in the BCCI matter. The second company, Cheyenne Holdings, Inc., dba Hoyt's, has a different name than the corporation referenced in the BCCI matter and reflects Washington residents forming the company in June 1992 with a termination date of June 30, 1993.

◆

REASONS FOR DENYING THE WRIT

This Court lacks jurisdiction to review the decision of the Washington State Court of Appeals. Even if this Court had jurisdiction to hear this case, it should refuse to do so, consistent with its discretion to grant certiorari only where there is a compelling reason.

A. The Supreme Court Lacks Jurisdiction to Review This State Court Decision

In this case, Bawazir has failed to comply with three jurisdictional prerequisites. 28 U.S.C. § 1257. First, he failed to properly raise a substantial federal question below. Second, he did not comply with Supreme Court Rule 14, which, among other things, requires a petition for certiorari to contain a detailed description of how and when any federal issues were raised below. Third, he has not shown that a conflict exists among the lower courts with regard to the issues presented herein. This Court should therefore deny certiorari, because it lacks jurisdiction to review this case.

1. The Petitioner Failed to Properly Raise a Substantial Federal Question Below

It is essential to the jurisdiction of the Supreme Court under § 1257 that a substantial federal question was properly raised in the state court proceedings. The policy considerations underlying this jurisdictional requirement are: (1) federal questions not raised in the state court "are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind[;]" (2) in a federal system "it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of [federal] Constitutional challenge, since the statutes may be construed in a way which saves their constitutionality[;]" (3) the federal question, if raised below, might "be blocked" by the state court on an adequate and independent state ground, thereby rendering unnecessary any Supreme Court review of the federal issue. *Cardinale v. Louisiana,* 394 U.S. 437, 439, 89 S. Ct. 1161, 1163, 22 L. Ed. 2d 398 (1969). Further, to insist that the state court be given the first opportunity to pass upon federal challenges to state action conforms to the Court's repeated acknowledgements as to the competence of state courts to adjudicate federal constitutional claims. *See, e.g., Allen v. McCurry,* 449 U.S. 90, 105, 101 S. Ct. 411, 420, 66 L. Ed. 2d 308 (1980).

Bawazir presents four federal issues to this Court. First, he claims that the "extraterritorial reach" of the Due Process clause is in question with regard to a state's assertion of personal jurisdiction over a nonresident who conducts international commerce within the forum state.

Pet. at 11-12. Second, Bawazir asserts that there exists an unsettled question under the Due Process clause about whether, in a suit by an agent, a non-resident principal who directs his non-resident agent to conduct business in a forum purposefully avails himself of the jurisdiction of the forum state. Petitioner both claims there is conflict in the lower courts regarding this issue, and argues that this question presents a novel issue of law. Pet. at 12-14. Third, Bawazir claims that the Washington State Court of Appeals decision conflicts with the Supreme Court's precedent holding that the purposeful availment requirement under the Due Process clause is satisfied when claims arise from a contract that has a substantial connection with the forum state. Pet. at 17-19. Finally, Bawazir argues that the Washington decision crafts an unduly narrow rule requiring a non-resident to "solicit" contacts with the forum state in order to satisfy the purposeful availment requirement under the Due Process clause.[4] Pet. at 19-21.

Of the four issues Bawazir presents for review by this Court, only the third was raised below. Bawazir failed to raise the other three issues in the courts below, and therefore, cannot properly seek review with respect to those claims.

---

[4] With respect to the fourth issue presented here for review, Bawazir seriously misstates the holding of the Washington State Court of Appeals. The Court of Appeals merely considered the fact that Mahfouz had been sought out by the Boeing Company, and not the reverse, as one of many facts leading the Court of Appeals to hold that the exercise of personal jurisdiction would be improper in this case. Ct. App. Op. at 23. The Washington courts did not, therefore, craft any rule requiring a nonresident defendant to have solicited contacts in the State of Washington before asserting personal jurisdiction over that defendant.

The one issue that Bawazir did raise below stems from a mis-apprehension of the basis of the dispute. In Petitioner's brief before the Washington State Court of Appeals, he argued that the state court decision would conflict with Supreme Court precedent holding that, when claims arise from a contract that has a substantial connection with the forum state, the purposeful availment requirement under the Due Process clause is satisfied. Appellant's Ct. App. Brief at 30-33. However, the Court of Appeals decided, after a careful analysis of the facts of this case, that Petitioner's dispute with Mahfouz arose, not out of Mahfouz's contract with The Boeing Company, but out of Mahfouz's alleged oral agreement with Bawazir. Ct. App. Op. at 21-22. Mahfouz's oral agreement with Bawazir had no connection with the State of Washington, and therefore, this issue has no application to Petitioner's case.[5] Petitioner thus failed to properly raise a substantial federal question below, and therefore, this Court lacks jurisdiction to consider granting certiorari.

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[5] This Court should not disturb the determination of the Washington State courts. In the absence of exceptional circumstances, the court will defer to state court factual findings, even when those findings relate to a constitutional issue. In the absence of clear error, the court will not overturn state trial court findings. *Hernandez v. New York,* 500 U.S. 352, 366, 111 S. Ct. 1859, 1869, 114 L. Ed. 2d 395 (1991).

2. The Petitioner Failed to Comply With Supreme Court Rule 14

Petitioner failed to fulfill the requirements of Supreme Court Rule 14(b)(iii)(g)(i). Bawazir's Petition for Certiorari is devoid of the required descriptions of how and when the federal issues were raised below, or of the necessary references. The Supreme Court should refuse to consider granting certiorari on this basis.

3. The Petitioner Failed to Provide This Court With a Basis for Granting Certiorari

Even if Bawazir had properly raised a substantial federal question below, and had complied with Supreme Court Rule 14, contrary to Petitioner's claim, there is no conflict between the state court decision and that of another state court of last resort or federal court.

a. To Review a State Court Decision, this Court Generally Requires a Conflict Regarding the Legal Issues Raised Below

Supreme Court Rule 10(b) recognizes that an exercise of the Court's power of review is called for if a "state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals." Sup. Ct. R. 10(c). Review of state court judgments by certiorari under this provision requires three things: (1) the decision must be that of a state court of last resort, (2) it must decide an important federal question,[6] and (3) the decision must conflict with the decision of another state court of last resort or of a United States Court of Appeals. *See Moore's Federal Practice* § 510.30.

b. Petitioner Failed to Show a Conflict in the Lower Courts Over the Issue in Dispute in This Case

Bawazir argues that the Washington State Court of Appeals decision conflicts with this Court's precedent that holds that purposeful availment is satisfied when a claim arises from a contract with a substantial connection with the forum state. Bawazir also urges this Court to grant certiorari on the basis of purported conflict in the lower courts, as well as the existence of a novel question, regarding whether under the Due Process clause, where an agent sues his principal, courts may exercise personal jurisdiction over the non-resident principal based upon the agent's contacts with the forum state.

As explained above, Bawazir only managed to raise one of these issues below, and is therefore unable to properly request certiorari. *See* Section A(1), above, for full discussion of petitioner's failure to raise claims below. However, even if Bawazir had properly raised these claims before the Court of Appeals, this Court should refuse to review these issues, because no conflict or novel question exists.

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[6] *See* Section B(1), below, for a discussion of Petitioner's failure to present an "important" federal question for review.

i. One Issue About Which Petitioner Alleges Conflict Is Irrelevant to His Case

With respect to Bawazir's claim that the state court decision conflicts with this Court's precedent holding that purposeful availment is satisfied when a claim arises from a contract with a substantial connection to the forum state, in this case it is clear that the dispute in this case does not arise out of a contract with a substantial connection to the State of Washington. In fact, the alleged oral agreement between Bawazir and Mahfouz has no connection whatsoever to Washington State. *See* Section A(1), above.

ii. There Is No Conflict in the Lower Courts, Nor Any Novel Issue, Regarding the Exercise of Personal Jurisdiction Over a Nonresident Principal in a Suit Brought by a Nonresident Agent

The cases cited by Bawazir do not support his argument that the Washington State Court of Appeals decision raises a novel question, or that there is conflict among the lower courts regarding the exercise of personal jurisdiction over a non-resident principal based on his agent's contacts with the forum state.

Bawazir claims that "[n]umerous courts have ruled that an agent may sue his non-resident principal in connection with a lawsuit arising out of the agent's activity in the forum state[,]" and cites six cases in support of this proposition. Pet. at 13 and n.13. However, the agent is not the plaintiff in the first two cases cited, *Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994), and *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209 (7th Cir. 1984). In *Chan*, the plaintiff was an employee of the defendant foreign company, and in *Deluxe Ice Cream Co.*, the plaintiff company sued both principal and agent. Therefore, neither of these cases support Bawazir's argument.

Although Bawazir cites three cases in which agents sue their non-resident principals, in each of them, the agent was, in fact, a resident of the forum state. *See Snyder v. Hampton Industries, Inc.*, 521 F. Supp. 130 (D. Md. 1981); *Terry, Inc. v. Sales Services Machine Tool Company*, 414 N.W.2d 568 (Minn. Ct. App. 1988); *Rose v. Silver*, 394 A.2d 1368 (D.C. Ct. App. 1978).

Notably, Bawazir cites no case that holds that a non-resident agent may hale a non-resident principal before a court based on the non-resident agent's contacts with the forum state. That is exactly what Bawazir is attempting to do. Bawazir is a citizen of Yemen, residing in Saudi Arabia, and Mahfouz is a Saudi Arabian citizen. Neither is a resident of Washington State. The agreement out of which this dispute arises was formed in Saudi Arabia, and contemplated work to be performed largely in Saudi Arabia. Washington State therefore, unlike the courts in the cases cited by Petitioner, has no interest in the resolution of this dispute. These three cases, therefore, are of no use to Bawazir.

Finally, Bawazir cites *Zerbel v. H.L. Federman & Co.*, 179 N.W.2d 872 (Wis. 1970). This case holds that (1) where a non-resident defendant knew that the contracted for services of the plaintiff would be performed in part in the forum state, (2) the cause of action arose out of defendants' failure to pay the plaintiff, and (3) defendant had two or three prior contacts with the plaintiff in the forum state, that the defendant had purposefully availed himself such that personal jurisdiction could properly be exercised. There is no discussion of agency in this case. This case does not stand for the proposition that an agent may sue his non-resident principal in connection with a lawsuit arising out of the non-resident agent's activities in the forum state.

None of the cases cited by Bawazir buttress his claim that the issues presented are the subject of any lower court conflict, or present a novel issue of law. Thus, it is clear that he has failed to provide this Court with a basis for granting certiorari.

B. The Supreme Court, Guided By Supreme Court Rule 10, Should Use Its Discretion to Deny Certiorari in This Case.

Even if Bawazir had satisfied the jurisdictional prerequisites outlined above, the Supreme Court should refuse to hear this case, based upon the lack of an important federal question or compelling reason to grant certiorari.

1. No Important Federal Question Is Implicated.

It is well settled that merely alleging a federal question does not give rise to jurisdiction. In illustrating the types of reasons for which the Court may grant certiorari, Supreme Court Rule 10 refers to "important Federal question[s] or an important question of Federal law." *Moore's Federal Practice* § 406.05[2][a]. The law relating to the facts of this case is well established. Bawazir has not shown that this case involved an important federal question.

2. There Is No Compelling Reason to Grant Certiorari.

Even if a case falls within the requirements of Section 1257, the Court may simply choose not to review it. "Certiorari review is discretionary and will be granted only for 'compelling reasons.' " *Moore's Federal Practice* § 406.30[1]. Petitioner has shown no such compelling reason, and several facts illustrate the lack of a compelling reason in this case.

a. The State of Washington Has No Interest in This Dispute.

The State of Washington has no interest in this dispute, and should not be forced to provide a forum for its adjudication. The dispute is between Bawazir and Mahfouz, neither of whom is a resident of Washington State. The alleged oral agreement between Mahfouz and Bawazir was entered into in Saudi Arabia. The work under the agreement was performed almost entirely in

Saudi Arabia. The only arguable nexus to Washington State that this dispute ever had was to the extent that Bawazir at one time had claims against The Boeing Company, which is a Washington State corporation. However, Boeing has been dismissed from the suit, leaving only the dispute regarding the alleged agreement between two nonresidents of Washington. Thus, there is no nexus to Washington State such that Washington would have any interest in adjudicating this dispute.

Bawazir refuses to acknowledge that his dispute with Mahfouz arises directly from any oral agreement that he might have had with Mahfouz, and *not* out of Mahfouz's contract to consult for The Boeing Company. Bawazir's confusion as to this issue is well described by the Washington State Court of Appeals in its decision. Ct. App. Op. at 20-22.

b. An Alternate Adequate Forum Exists

Bawazir claims that he will be "deprived of legal redress if forced to pursue his claims against Sheikh Mahfouz in Saudi Arabia[,]" representing that "only Muslims may testify in Saudi Courts." Pet. at 11, and n.12. The author of the referenced article outlines a number of alternatives available to foreigners involved in commercial disputes to avoid the Saudi religion-based *Shari'a* tribunals. *See* D. Karl, *Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know,* 25 Geo. Wash. J. Int'l L. & Econ., 131, 145, 147-49, 164, 169 (1992).

Moreover, although irrelevant to this Court's resolution of Bawazir's Petition for Certiorari, it is worth noting that numerous courts have held Saudi Arabia an adequate forum, recognizing that "because of its position as a center of international commerce," Saudi Arabia "is a cosmopolitan nation," not "a provincial backwater." *Al-Salamah Arabian Agencies Co. v. Reece*, 673 F. Supp. 748, 751 (M.D. N.C. 1987). In *Kamel v. Hill-Rom, Inc.*, 108 F.3d 799 (7th Cir. 1997), for example, the court expressly held a Saudi forum adequate, *id.* at 803, dismissing a suit where the Indiana defendant had consented to Saudi jurisdiction. Mahfouz is a Saudi citizen and resident and is obviously subject to the jurisdictional rules of the Saudi courts. *See also Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 291 (5th Cir. 1989); *Ahmed v. Boeing Co.*, 720 F.2d 224, 226 (1st Cir. 1983) (Breyer, J.); *Jeha v. Aramco*, 751 F. Supp. 122, 125-26 (S.D. Tex. 1990), *aff'd mem.*, 936 F.2d 569 (5th Cir. 1991); *Tisdale v. Shell Oil Co.*, 723 F. Supp. 653, 658-59, 662 (M.D. Ala. 1987); *In re Disaster at Riyadh Airport, Saudi Arabia, on August 19, 1980*, 540 F. Supp. 1141, 1145-46 (D.D.C. 1982); *Shields v. Mi Ryung Constr. Co.*, 508 F. Supp. 891, 895 (S.D.N.Y. 1981); and *generally see also* 17 Moore's Federal Practice §§ 111.70[2][d]-[e]. Thus, although Bawazir might prefer to have his dispute adjudicated in the Washington State court system, Saudi Arabia presents an adequate alternative forum, and one which is vastly more appropriate for a dispute between two Saudi residents.

◆

CONCLUSION

The Petition should be denied.

January 29, 2001

Respectfully submitted,

JAMES R. MURRAY*
CHARLES C. GORDON
SARAH JAEL DION
GORDON MURRAY TILDEN
1325 Fourth Avenue, Suite 1800
Seattle, WA 98101
(206) 467-6477

Attorneys for Respondent
**Counsel of Record*

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

TAHIR M. BAWAZIR, Plaintiff, v. THE BOEING COMPANY, a Delaware corporation; and SHEIKH KHALID BIN MAHFOUZ, Defendants.	No. 98-2-14646-OSEA DECLARATION OF DAVID J. DADOUN IN SUPPORT OF PLAINTIFF'S MEMORANDUM IN OPPOSITION TO KHALID BIN MAHFOUZ'S MOTION TO DISMISS (Filed Aug. 14, 1998)

DAVID J. DADOUN declares as follows:

1. I am an attorney for plaintiff Tahir Bawazir. I am competent to testify and have personal knowledge regarding the following.

2. Attached as Exhibit 1 is a true and correct copy of the indictment against Khalid Bin Mahfouz ("Mahfouz") by the People to the State of New York issued in July 1992.

3. Attached as Exhibit 2 is a true and correct copy of the complaint filed on July 6, 1992 in the civil action filed in the U.S. District Court, Southern District of New York, *Board of Governors of the Federal Reserve System v. Khalid bin Mahfouz*, Civil Action No. 92civ5096.

4. Attached as Exhibit 3 is a true and correct copy of a July 8, 1992 news article from *Moneyclips* headlined "Khalid bin Mahfouz quits NCB".

5. Attached as Exhibit 4 is a true and correct copy of a July 8, 1992 news article from the *Financial Times* headlined "Saudi banker in BCCI case quits".

6. Attached as Exhibit 5 is a true and correct copy of the court opinion and ruling regarding the temporary restraining order filed in *BCCI Holdings vs. Sheikh Khalid bin Mahfouz,* 1992 U.S. Dist. LEXIS 18834 (December 10, 1992) filed in the U.S. District Court for the District of Columbia, Civil Action No. 92-2763.

7. Attached as Exhibit 6 is a true and correct copy of documentation pertaining to the master license for Plymouth Holdings, Ltd., doing business as Newport Motor Company.

8. Attached as Exhibit 7 is a true and correct copy of documentation pertaining to the master license for Cheyenne Holdings, Inc., doing business as Hoyt's.

9. Attached as Exhibit 8 is a true and correct copy of a July 16, 1998 letter from Kari Anne Smith, counsel for Boeing, to Charles Nomellini, Michael Vaska and David Dadoun.

10. Attached as Exhibit 9 is a true and correct copy of a July 15, 1998 final stipulation regarding the first amended complaint.

11. Attached as Exhibit 10 is a true and correct copy of a U.S. Department of State report entitled "Saudi Arabia Country Report on Human Rights Practices for 1997", released January 30, 1998 by the Bureau of Democracy, Human Rights and Labor.

12. Attached as Exhibit 11 is a true and correct copy of a September 1997 news article from *Euromoney* headlined "Good times hit the Gulf" (Mahfouz resumes control of NCB).

13. Mahfouz was served with a summons and complaint in the lawsuit in California on May 13, 1998. This occurred after a week-long stakeout at his hotel in Los Angeles. Mahfouz reportedly was accompanied by security at the time he was served.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed in Seattle, Washington this 14th day of August 1998.

/s/ David J. Dadoun
DAVID J. DADOUN

EXHIBIT 6

[SEAL]

STATE OF WASHINGTON
DEPARTMENT OF LICENSING
PO Box 9020 • Olympia, Washington 98507-9020

August 13, 1998

Foster Pepper & Shefelman
1111 Third Ave, Suite 3400
Seattle WA 98101

I certify that the attached information is a true and correct copy of the information in the Master License database.

Plymouth Holdings, Limited

dba

Newport Motor Company

Records Custodian:

/s/ Jody Miller 8/13/98

Jody Miller Date

Master License Service
Department of Licensing
PO Box 9034
Olympia, WA 98507-9034
(360) 664-1400

INFORMATION FROM THE MASTER LICENSE DATABASE

For: FOSTER, PEPPER & SHEFELMAN Page: 2
Owner Name: PLYMOUTH HOLDINGS, LIMITED
UBI: 601 471 850 001
Owner Type: DOMESTIC PROFIT CORPORATION Active
Date of Incorporation: 06/10/1993 State: WA
Expiration Date: 06/30/1999

Registered Agent: M A THOMPSON
15100 SE 38TH ST 101 #809
BELLEVUE, WA 98006

Corporate Officers:

VIRGIL BADGER THOMPSON	SEC
MARK A THOMPSON	PRES COB
B L THOMPSON	VP TREAS

The Corporate officers listed were given at the time the most recent Master Business Application was filed. For current corporate officers, contact the Secretary of State's Office at (360) 753-7115.

Registered Name(s)NEWPORT MOTOR COMPANY

Date	Cancel Date
07/28/1993	

Firm Name: NEWPORT MOTOR COMPANY

Business Location Address:
12815 NE 14TH PL
BELLEVUE WA 98005

Mailing Address:
15100 SE 38TH ST 101 # 809
BELLEVUE, WA 98006

Location Status: ACTIVE

Location First Activity Date: 7/29/1993

Endorsements For This Location:
TAX REGISTRATION

Status	Exp. Date
T	

Firm Name: NEWPORT MOTOR CO LTD

Business Location Address:

12815 NE 4TH PL
BELLEVUE, WA 98005

Mailing Address:

12815 NE 14TH PL
BELLEVUE, WA 98005

Location Status: ACTIVE

Location First Activity Date: 7/29/1993
Endorsements For This Location:
MOTOR VEHICLE WHOLESALER

Status	Exp. Date
A	06/30/1999

EXHIBIT 7

[SEAL]

STATE OF WASHINGTON
DEPARTMENT OF LICENSING
PO Box 9020 • Olympia, Washington 98507-9020

August 13, 1998

Foster Pepper & Shefelman
1111 Third Ave, Suite 3400
Seattle WA 98101

I certify that the attached information is a true and correct copy of the information in the Master License database.

Cheyenne Holdings, Inc.

dba

Hoyt's

Records Custodian:

/s/ Jody Miller 8/13/98

Jody Miller Date

Master License Service
Department of Licensing
PO Box 9034
Olympia, WA 98507-9034
(360) 664-1400

INFORMATION FROM THE MASTER LICENSE DATABASE

For: FOSTER, PEPPER & SHEFELMAN Page: 1
Owner Name: CHEYENNE HOLDINGS, INC.
UBI: 601 393 235 001
Owner Type: DOMESTIC PROFIT
CORPORATION Terminated
Date of Incorporation: 06/03/1992 State: WA
Expiration Date: 06/30/1993

Registered Agent: RICHARD A RAYMER
W 814 MAIN
SPOKANE WA 99201

Corporate Officers:
DEBRA K RAYMER SEC/TREAS

RICHARD A RAYMER PRES

The Corporate officers listed were given at the time the most recent Master Business Application was filed. For current corporate officers, contact the Secretary of State's Office at (360) 753-7115.

Registered Name(s)
HOYT'S

Date	Cancel Date
07/07/1992	

Firm Name: HOYT'S

Business Location Address:
814 W MAIN
SPOKANE WA 99201

Mailing Address:
814 W MAIN
SPOKANE WA 99201

Location Status: ACTIVE

Location First Activity Date: 6/3/1992

Endorsements For This Location:	Status	Exp. Date
UNEMPLOYMENT INSURANCE	T	
INDUSTRIAL INSURANCE	T	
TAX REGISTRATION	T	

(A)

Supreme Court, U.S.
FILED
FEB 7 2001
OFFICE OF THE CLERK

No. 00-1102

IN THE

SUPREME COURT OF THE UNITED STATES

TAHIR M. BAWAZIR,
Petitioner,

v.

SHEIKH KHALID BIN MAHFOUZ,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE WASHINGTON STATE COURT OF APPEALS
(DIVISION I)

REPLY BRIEF FOR PETITIONER

CAMDEN M. HALL
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Robert L. Stern et al., *Supreme Court Practice* (7th ed. 1993) . . . . *passim*

PRELIMINARY STATEMENT

Respondent Sheikh Khalid Bin Mahfouz ("Sheikh Mahfouz") virtually ignores the merits of the underlying Petition in his Brief in Opposition. Rather, he asks the Court to deny the writ on procedural grounds, claiming the Court "lacks jurisdiction to review the decision of the Washington State Court of Appeals" under 28 U.S.C. §1257 because Petitioner Tahir M. Bawazir ("Bawazir") purportedly failed to (1) "properly raise a substantial federal question below," (2) "comply with Supreme Court Rule 14," and (3) show a "conflict exists among the lower courts with regard to the issues presented herein" under Supreme Court Rule 10(b). Respondent's Brief in Opposition ("Opp.") at 6. Sheikh Mahfouz's arguments are without merit.

First, Sheikh Mahfouz ignores that, in the proceedings below, *both parties* addressed whether Washington State could assert personal jurisdiction over him consistent with the principles embodied under the Due Process Clause of the Fourteenth Amendment. Those arguments, and the decisions by the Washington State courts, form the basis for the federal constitutional issues framed in Bawazir's Petition. Second, Sheikh Mahfouz misapplies the Supreme Court Rules as an alternative basis to deny jurisdiction. Sheikh Mahfouz's highly strained interpretation of the Supreme Court Rules is not a proper ground for this Court to decline jurisdiction.

Bawazir's Petition raises important questions under the Due Process Clause about when states may assert personal jurisdiction over foreign persons, like Sheikh Mahfouz, who derive substantial economic benefit by conducting international commerce in a forum state personally and through their agents. The decision of the Washington State courts below conflicts with the precedent of this

Court, and other state and federal courts, as to when personal jurisdiction may be asserted consistent with the due process principles established by this Court. Sheikh Mahfouz has not rebutted in his Opposition the compelling reasons why certiorari should be granted. Left undisturbed, the decision of the Washington State courts will cause a chilling effect on international commerce.

A. This Court Has Jurisdiction to Review the Petition Because the Federal Issues that Are Raised Were Addressed Below.

Sheikh Mahfouz claims that this Court lacks jurisdiction to hear the Petition because "[o]f the four issues Bawazir presents for review by this Court, only the third was raised below." Opp. at 6. Sheikh Mahfouz ignores the fact that all four issues raised in the Petition were specifically addressed to the Washington State trial court and Washington State Court of Appeals, and were preserved in Bawazir's Petition for Discretionary Review to the Washington State Supreme Court. Relevant excerpts of Bawazir's briefs, which expressly address the federal issues raised in the Petition, are attached as an Appendix to this Reply.[1]

Sheikh Mahfouz's claim that these issues were not raised below is disingenuous given that *he* sought dismissal of the lawsuit against him because, he argued, the exercise of personal jurisdiction over him would violate the Due Process Clause. *Cf. Cohen v. Cowles Media Co.,* 501 U.S. 663, 668 (1991) ("It can hardly be said that there is no First Amendment issue present in the case when respondents have defended this suit all along... [under] the First Amendment").

---

[1] In determining whether a question was "specially set up or claimed" within the meaning of § 1257, "it is relevant and usually sufficient to ask whether petitioners satisfied the state rules governing presentation of issues." *Amalgamated Food Employees Union Local 509 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 334 (1968) (Harlan, J., dissenting). Sheikh Mahfouz makes no claim that Bawazir did not comply with the state rules in presenting the federal issues on appeal, and they are explicitly referenced in Bawazir's Appellate Brief as required under Washington Rules of Appellate Procedure Rule 10.3. *See App.* A-12 - A-21.

In addition, all four issues raised in the Petition center on whether Sheikh Mahfouz's contacts with Washington State satisfy the purposeful availment requirement under the Due Process Clause. Sheikh Mahfouz *concedes* the third issue relating to the purposeful availment requirement under the Due Process Clause "was raised below." Opp. at 8. This is all that is necessary for jurisdiction to exist for all of the issues raised in the Petition. *See* Robert L. Stern, et al., *Supreme Court Practice* §3.2 at 91 (7th Ed. 1993) ("It is enough that the title, right, privilege, or immunity under federal law be asserted affirmatively or defensively and that the state court's decision pass upon the federal question"); *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928) ("No particular form of words or phrases is essential," and "if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented").

Finally, it is well-settled that "Parties are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed." *Dewey v. Des Moines,* 173 U.S. 193, 198 (1899). Indeed, this Court has "never suggested that the jurisdictional stipulations of §1257 require that all arguments on behalf of, let alone in opposition to, a federal claim be raised and decided below." *Illinois v. Gates,* 462 U.S. 213, 248 (1983) (White, J., concurring). Rather, the "parties may enlarge upon the questions they do present so long as the enlargement may be deemed fairly included or comprised within the stated questions." *Supreme Court Practice* §3.20 at 137 (citing *Gates,* 462 U.S. at 219-20).

To the extent the questions presented here are viewed as an "enlargement" of the Due Process Clause questions addressed below, this Court "should have no hesitation in holding the assignment sufficient to permit the question to now be raised and argued." *Dewey,* 173 U.S. at 198. Bawazir's Petition, Appendix to the Petition, this Reply and Appendix all demonstrate that substantial federal questions under the Due Process Clause were raised below. Jurisdiction clearly exists. *See Supreme Court Practice* §3.20 at 137 (this "Court's jurisdiction over a state court case thus effectively attaches once the Court is satisfied that a petition presents substantial federal questions raised or decided below").

B. Petitioner Complied with Supreme Court Rule 14, and Respondent's Highly Strained Reading of that Rule Is not a Basis to Deny Jurisdiction.

Sheikh Mahfouz claims that the Court lacks jurisdiction under 28 U.S.C. §1257 because "Petitioner failed to fulfill the requirements of Supreme Court Rule 14(b)(iii)-(g)(i) [sic]." Opp. at 6, 10. Presumably, Sheikh Mahfouz means Rule 14.1(g)(i), which does not invoke the Court's jurisdiction under §1257 but merely describes what a petition for a writ of certiorari must contain. Sheikh Mahfouz's highly strained interpretation of Rule 14 is flawed, and does not serve as a proper basis to deny jurisdiction under §1257.

First, Bawazir complied with *all* aspects of Rule 14. A "petition for a writ of certiorari should be stated briefly and in plain terms." Rule 14.3. It "need not contain '*all*' that is material and need not contain references to an appendix or the record." *Supreme Court Practice* §6.30 at 352. Indeed, Rule 14.1(g) requires a "*concise* statement of the case." (Emphasis added). Further, the material required under 14.1(g)(i) must only contain information "to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." In addition, Rule 14.1(g)(i) permits portions of the record relied upon to be "included in the appendix." Bawazir's Petition and Appendix clearly set forth in "concise" and "plain" terms that a "federal question was timely and properly raised" below.

Second, even if, for purposes of argument, Bawazir did not comply in a hyper-technical sense with Rule 14 as Sheikh Mahfouz claims, the remedy is not to deprive Bawazir of redress with this Court. Instead, "[i]f the Clerk determines that a petition submitted timely and in good faith is in a form that does not comply with this Rule, . . . the Clerk will return it with a letter indicating the deficiency. A corrected petition received no more than 60 days after the date of the Clerk's letter will be deemed timely." Rule 14.5.

Sheikh Mahfouz does not cite one single reported decision of this Court supporting the harsh result he seeks. As this Court admonished, "[o]ur jurisdiction does not depend on citation to book and verse." *Eddings v. Oklahoma,* 455 U.S. 104, 113 n.9 (1982). This Court "will not strain the record in an effort to divest petitioner of his federal forum." *Taylor v. Kentucky,* 436 U.S. 478, 482 n.10 (1978).

C. Respondent's Reliance on Supreme Court Rule 10(b) as a Basis to Deny Jurisdiction Is Misplaced.

Finally, Sheikh Mahfouz claims no jurisdiction exists because Bawazir purportedly did not show under Rule 10(b) that a "conflict exists among the lower courts with regard to the issues presented herein." Opp. at 6, 10-11. However, Rule 10(b) only applies to appeals from a "state court of last resort." In contrast, Rule 10(c) applies when "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

Sheikh Mahfouz's reliance on Rule 10(b) is without foundation. Because the Washington State Supreme Court denied discretionary review of Bawazir's appeal, the judgment of the Washington State Court of Appeals "rather than the order of refusal by the higher court is the judgment reviewable under §1257." *Supreme Court Practice* §3.12 at 115. *See also Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n.1 (1968) ("The Texas Supreme Court denied discretionary review and therefore the appeal is from the judgment of the Court of Civil Appeals"). Consequently, Rule 10(c), *not* 10(b), applies to this Petition.

Bawazir's Petition properly frames the issues as required under Rule 10(c). Sheikh Mahfouz's jurisdictional argument under Rule 10(b) is without merit.

CONCLUSION

Bawazir's Petition sets forth many compelling reasons why this Court should grant review of the writ. Not only will Bawazir be deprived of legal redress should the writ be denied, but the narrow rules adopted by the Washington State courts threaten to erode this Court's fundamental principles of when states may assert personal jurisdiction over nonresidents consistent with the Due Process Clause. The writ should be granted.

Respectfully submitted,

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APPENDIX G

[EXCERPTS FROM PLAINTIFF TAHIR M. BAWAZIR'S MEMORANDUM IN OPPOSITION TO DEFENDANT KHALID BIN MAHFOUZ'S MOTION TO DISMISS]

[Filed AUG 14 1998]

The Honorable Jim Bates

SUPERIOR COURT OF WASHINGTON
IN AND FOR KING COUNTY

No. 98-2-14646-0SEA

TAHIR M. BAWAZIR,

Plaintiff,

v.

THE BOEING COMPANY, a Delaware corporation;
and SHEIKH KHALID BIN MAHFOUZ,

Defendants.

PLAINTIFF TAHIR M. BAWAZIR'S MEMORANDUM IN OPPOSITION TO DEFENDANT KHALID BIN MAHFOUZ'S MOTION TO DISMISS

* * *

[5]

V. LEGAL ARGUMENT

A. The Court May Assert Jurisdiction To The Full Extent Permitted Under the Due Process Clause.

Washington courts may exert jurisdiction over nonresident defendants to the full extent permitted by the Due Process Clause of the United States Constitution. *See Shute v. Carnival Cruise Lines,* 113 Wn.2d 763, 771 (1989) ("Washington's long-arm statute extends jurisdiction to the limit of federal due process"); *Hartley v. Am. Contract Bridge League,* 61 Wn. App. 600, 605 (1991) ("The 'doing business' requirement . . . subsumes the due process requirement"). Bawazir has the burden to establish "only a prima facie showing of jurisdiction." *MBM Fisheries v. Bollinger Mach. Shop,* 60 Wn. App. 414, 418 (1991). On a motion to dismiss the allegations of the Complaint are deemed to be true. *Id.*

* * *

[8]

2. The Activities of Mahfouz's Agents, Including NCB, May Be Imputed To Him To Confer Jurisdiction.

Mahfouz claims that "NCB's contacts with Washington, if any, cannot be used to justify suit against Mahfouz." Mahfouz Motion at 12. Mahfouz is widely referred to as "Mr. NCB" and it is reported that "NCB is Khalid and Khalid is NCB." Dadoun Dec., Ex. 3 (*Moneyclips,* July 8, 1992). Mahfouz ignores his unique relationship with NCB, and that as a partner of NCB its activities – and the activities of any of his agents, including Bawazir – may be imputed to him for purposes of asserting jurisdiction. *See Crose v. Volkswagenwerk*

Aktiengesellschaft, 88 Wn.2d 50, 55 (1977) (general jurisdiction may be asserted over foreign corporation based on activities of its agent in Washington); *Trump v. Nevada & GNLV*, 109 Nev. 687, 694, 857 P.2d 740, 745 (1993) (contacts of agent with particular forum are attributable to principal in determining whether personal jurisdiction over principal is appropriate); *Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398, 1405-06 (9th Cir. 1994) (activities of general agent attributable to principal in asserting jurisdiction).

* * *

[10]

C. The Court May Assert Specific Jurisdiction Over Mahfouz.

While the long-arm statute outlines specific requirements for establishing specific jurisdiction for the transaction of business, courts have often recognized that its limits extend as broadly as permitted by federal due process. *Shute*, 113 Wn.2d at 767. Federal due process permits the exercise of in personam jurisdiction when: 1) there have been purposeful contacts between the defendant in the forum state; 2) plaintiff's cause of action arises out of or relates to those contacts; and 3) the exercise of jurisdiction is reasonable. *Kysar v. Lambert*, 76 Wn. App. 470, 487-88 (1995). Once purposeful availment has been established, the forum's exercise of jurisdiction is presumptively reasonable. To rebut the presumption, the defendant " 'must present a compelling case' that the exercise of jurisdiction would, in fact, be unreasonable." *Roth v. Marquez*, 942 F.2d 617, 621 (9th Cir. 1991) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)).

1. Mahfouz Purposefully Availed Himself of this Forum.

a. The Boeing Agreement Has A Substantial Connection to Washington.

This dispute directly arises from commission payments owed under the Agreement. In *Burger King,* the Supreme Court recognized that where individuals " 'purposefully derive benefit' from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities." 471 U.S. at 473-74. The standard of purposeful availment is not rigorous, and "casts a wide net." *Pritzker v. Yari,* 42 F.3d [11] 53, 62 (1st Cir. 1994), *cert. denied,* 115 S.Ct. 1959 (1995). Where, as here, Mahfouz deliberately created "continuing obligations between himself and residents of the forum, . . . the Due Process Clause may not be readily wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Burger King,* 471 U.S. at 474-76. *See also McGee v. Int'l Live Ins. Co.,* 355 U.S. 220, 223 (1957) ("it is sufficient for purposes of due process that the suit was based on a contract which had a substantial connection with that State").

Burger King is dispositive here. In *Burger King,* defendant entered into a franchise relationship with Burger King Corp., a Florida corporation. 471 U.S. at 464. Defendant resided in Michigan. *Id.* at 466. Defendant forwarded an application and final contract to Burger King at its headquarters in Miami. Defendant's sole contact with Florida was through his business partner, who attended a management training course at Burger King's Miami headquarters. *Id.* The contract was governed by Florida law. *Id.* Burger King sued defendant in Miami for breach of the contract. The Supreme Court found that asserting jurisdiction over the defendant was proper because he had purposefully availed himself to Florida's jurisdiction by entering into a contract with Burger King. The " 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Id.* at 475.

Mahfouz claims, however, he is immune from jurisdiction because the "mere execution of a contract" is insufficient to establish jurisdiction. Mahfouz Motion at 7. The cases relied upon by Mahfouz are unavailing. *See CTVC of Hawaii Co., Ltd. v. Shinawatra,* 82 Wn. App. 699, 714 (1996) (contacts by a Thai national involving a Thai joint venture governed by Thai law insufficient to confer jurisdiction where none of the defendant's duties or responsibilities under the parties' agreement were carried out in Washington, and plaintiffs failed to show that the defendant "derived [12] any legal protection or benefit in Washington"); *MBM Fisheries,* 60 Wn. App. at 424 (court declined to assert jurisdiction over a Louisiana defendant when the sole contact with Washington involved the *single transmission* of a contract from Seattle via a telecopier machine, involving a *single contract,* with all work relating to the contract being performed in Louisiana and defendant never setting foot in Washington to consummate or negotiate the transaction.)

As in *Burger King,* Mahfouz's contacts with Washington are neither random, fortuitous nor attenuated. Mahfouz had an ongoing relationship with Boeing for six years. He entered into five separate contracts with Boeing annually, from 1992-1996. Bawazir Dec. ¶ 23. Boeing exercised substantial control over Mahfouz, and his principal, Bawazir. Among other things, the Agreement requires Mahfouz to do the following:

- Promptly inform Boeing whenever a Customer is interested in discussing the purchase of Aircraft and at Boeing's request, arrange to bring Boeing and the Customer together for negotiations;
- Consultant shall not engage in activities in conflict with Boeing's interests; and
- Consultant shall use promotional literature, data and information furnished by Boeing only in furtherance of the objectives of this Agreement.

Further, the Agreement gave either party the option to terminate or renew the Agreement at the end of its term. Agreement ¶¶ 6-7. Mahfouz *chose* to renew the Agreements annually.

In addition, Bawazir, as Mahfouz's representative, had substantial and continuous contacts with Boeing, including numerous meetings in Seattle.[7] These contacts are, at a minimum, as follows:

[13]

- Under Mahfouz's express instructions to Boeing, Bawazir served as the primary contact with Boeing officials and representatives under the terms of the Consulting Agreement, correspondence from Boeing was directed to Bawazir, and Mahfouz requested that Boeing coordinate its activities through Mahfouz [sic] [Bawazir];

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[7] Washington's long-arm statute explicitly subjects any person "who in person or *through an agent*" transacts business in Washington. RCW 4.28.185 (emphasis added). The activities of agents have uniformly been held sufficient to confer personal jurisdiction over the principal. *See Chan.*, 39 F.3d at 1405-06; *Trump*, 109 Nev. at 694 (agent's contacts with forum attributable to principal); *Grove Press, Inc. v. Angleton*, 649 F.2d 121, 122 (2nd Cir. 1981) (agency established for jurisdictional purposes by showing that agent acted in forum with knowledge and consent of the nonresident principal).

- Bawazir made many visits to Seattle as part of his activities on behalf of Mahfouz and Boeing;
- Bawazir met and coordinated with senior Boeing management in Seattle by telephone for several hours each week during the six year duration of the Agreement; and
- Bawazir assisted Boeing in the preparation of correspondence and communication to Saudi royal officials and Saudi management as part of his responsibilities under the Agreement.

Bawazir Dec. ¶¶ 11-16.

Cumulatively, these contacts are substantial, and not "fortuitous" or "incidental" as Mahfouz claims.[8] Washington and federal courts have not hesitated to confer personal jurisdiction over nonresident defendants on facts far less compelling than here. *See Kysar v. Lambert,* 76 Wn. App. 470, 489-90 (1995) (court exercised jurisdiction over Massachusetts resident who ordered Christmas trees from Washington though contacts were limited to "an exchange of forms, letters and phone calls between Washington and Massachusetts," and the contract contained a choice-of-law clause that Washington law would govern any disputes).[9]

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[8] ***See Burger King,*** **471 U.S. at 478-79 (the entire business transaction, including "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing . . . must be evaluated in determining whether the defendant purposefully established minimal contacts within the forum");** ***Pepsi-Cola Bottling Co., Inc. v. Buffalo Rock Co., Inc.,*** **593 F. Supp. 1559, 1565 (N.D. Al. 1984) ("resulting contacts can hardly be called fortuitous or unintended" where defendant was fully aware from outset that transaction would be intimately connected with Alabama, and that interests in transaction required substantial number of activities there).**

[9] ***See also Sorb Oil Corp. v. Batalla Corp.,*** **32 Wn. App. 296, 299 (1982) (nonresident defendant engaged in purposeful con-**

[footnote continued]

[14] b. Solicitation Is Not A Prerequisite To Jurisdiction.

Mahfouz suggests he should be immune from jurisdiction because "Boeing, not Mahfouz" solicited the Agreement which was renewed by the parties on an annual basis for five years. Mahfouz Motion at 7. This assertion neither comports with the facts or the law.

First, the Complaint makes clear that Mahfouz and Bawazir "were one of several teams vying to act as Boeing's consultant in the competition for the Saudia commercial airplane order." Complaint ¶ 15. The Agreement was automatically terminable without notice at the end of its one-year term. Agreement ¶ 6. Of his own volition, Mahfouz sent to Boeing renewals each year, from 1993-1996, thus explicitly soliciting Boeing with a request for renewal of his services. Bawazir Dec. ¶ 23. Boeing was not obligated to renew the Agreement. Agreement ¶ ¶ 6-7. In addition, Mahfouz solicited The Frank Russell Company with a request that it act as a referral in connection with the Agreement. Mahfouz needed the referral in order to be approved as Boeing's consultant with his partner, Bawazir. Bawazir Dec. ¶ 10.

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duct by ordering by telephone oil products from Washington corporation that were shipped from Indiana, not Washington, to defendant); *Crown Controls, Inc. v. Smiley*, 47 Wn. App. 832, 836-839 (1987) (nonresident defendant's telephone orders sufficient to confer jurisdiction); *Cofinco of Seattle v. Wiess*, 25 Wn. App. 195, 196-97 (1980) (nonresident defendant purposefully availed himself of the privilege of conducting activities within Washington state by entering into an oral telephone contract from New York with Washington employer); *Roth v. Marquez*, 942 F.2d 617, 622 (9th Cir. 1991) (nonresident defendant purposefully availed himself in California where checks owed under the agreement would have originated from the forum state and depended upon activities in the forum).

Second, even if Mahfouz purportedly did not solicit Boeing to become its consultant – a fact the parties dispute – the absence of solicitation is not fatal to asserting jurisdiction over Mahfouz. It is well-settled that "a party who does not initiate the business contact is not thereby immune from personal jurisdiction of Washington courts if a business relationship subsequently arises." *Sorb Oil,* 32 Wn. App. 296, 299.[10]

* * *

[17]

2. This Cause of Action Arises From The Consultant Services Agreement.

Washington may assert jurisdiction over Mahfouz so long as Bawazir's cause of action would not have arisen "but for" Mahfouz's contacts with Washington. *See Shute v. Carnival Cruise Lines,* 113 Wash.2d 763, 772 (1989) (plaintiff's injury on cruise ship in Mexico would not have arisen but for nonresident defendant's advertising its travel tours in Washington).

Mahfouz contends, without any supporting evidence, the "but for" test is unsatisfied because he visited Washington only once, and his visit was "incidental" to the Saudia sale. Mahfouz Motion at 7-8. In reality, Bawazir's claims arise from the Agreement between Boeing and

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[10] *See also Cofinco,* 25 Wn. App. at 196-97 (jurisdiction over nonresident defendant initially contacted by Washington employer to perform services in New York sufficient to confer jurisdiction in Washington); *Kysar,* 76 Wn. App. at 489-90 ("exchange of forms, letters and phone calls" coupled with Washington choice-of-law clause supported finding of jurisdiction even if plaintiff initiated transaction).

Mahfouz. Bawazir seeks commission payments owed to him under the Agreement. The commission payments were to be paid only if as a result of the services performed under the Agreement, Boeing obtained a contract with Saudia. In other words, this dispute would not arise "but for" the $5.2 billion contract Boeing won with Saudia, and under which commission payments are owed. This second prong of the due process test is easily satisfied.

* * *

APPENDIX H

[EXCERPTS FROM APPELLANT'S BRIEF]

No. 43375-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

TAHIR M. BAWAZIR,
Appellant,

v.

THE BOEING COMPANY, AND
SHEIKH KHALID BIN MAHFOUZ
Respondents.

APPELLANT'S BRIEF

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* * *

[4] II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The Trial Court erred in granting Boeing's 12(b)-(6) motion to dismiss.

2. The Trial Court erred in granting Sheikh Mahfouz's motion to dismiss the lawsuit for lack of personal jurisdiction.

3. The Trial Court erred in granting Sheikh Mahfouz's motion to dismiss the lawsuit on forum non conveniens grounds.

4. The Trial Court erred in summarily dismissing the Complaint against Sheikh Mahfouz without permitting Bawazir the right to conduct discovery.

B. Issues Pertaining to Assignments of Error

1. Do numerous factual disputes relating to Bawazir's claims against a Washington State resident corporation, Boeing – including Boeing's assertion that it made a "mistake" when it paid Bawazir a [5] commission installment of $6.8 million for the sale of airplanes manufactured in Washington State – preclude dismissal under CR 12(b)(6) of claims that Boeing had an obligation to pay Bawazir for helping Boeing win a $5.2 billion airplane order with Saudia?

2. Did Sheikh Mahfouz purposefully avail himself of this state's jurisdiction by agreeing to be employed under a six-year contractual relationship to provide consulting services on Boeing's behalf, and at its discretion, for the purchase of Washington State manufactured Boeing airplanes when this lawsuit would not have arisen but for this long-term relationship?

3. Did the Trial Court abuse its discretion in dismissing the lawsuit on forum non conveniens ground by (a) not

entering any findings of fact explaining its decision; (b) not requiring Sheikh Mahfouz to offer any evidence or otherwise meet his burden to show that Saudi Arabia is an adequate alternative forum; (c) not requiring Sheikh Mahfouz and Boeing to consent to service of process, jurisdiction or enforcement of any judgment in Saudi Arabia; and (d) not requiring Sheikh Mahfouz to provide any evidence that Saudi Arabia is a more convenient forum to hear this dispute?

4. Did the Trial Court err in denying Bawazir the right to conduct discovery on jurisdiction and forum non conveniens issues after Bawazir made a prima facie showing that jurisdiction over Sheikh Mahfouz exists and Washington State is the only forum in which Bawazir can obtain justice?

* * *

[27]

B. Sheikh Mahfouz Purposefully Availed Himself of This State's Jurisdiction Through His Six-Year Employment By Boeing.

The Trial Court's determination whether jurisdiction may be exercised is a question of law reviewable de novo when the underlying facts are undisputed. *Hartley v. Am. Contract Bridge League,* 61 Wn.2d 600, 603, 812 P.2d 109 (1991). Because Bawazir's evidence in support of his opposition to Sheikh Mahfouz's motion to dismiss is uncontroverted, no facts underlying the basis for jurisdiction are in dispute.

1. Only a Prima Facie Showing of Jurisdiction Is Required.

Washington courts may exercise jurisdiction over nonresident defendants to the full extent permitted by the Due Process Clause of the U.S. Constitution. *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 771, 783 P.2d 78 (1989). Federal due process permits the exercise of in personam jurisdiction when: (1) there have been purposeful contacts between the defendant in the forum state; (2) plaintiff's cause of action arises out of or relates to those contacts; and (3) the exercise of jurisdiction is reasonable. *Kysar v. Lambert*, 76 Wn. App. 470, 487-88, 887 P.2d 431 (1995). Once purposeful availment has been established, the forum's exercise of jurisdiction is presumptively reasonable. To rebut the presumption, the defendant " 'must present a compelling case' that the exercise of jurisdiction would, in fact, be unreasonable." *Roth v.* [28] *Marquez*, 942 F.2d 617, 621 (9th Cir. 1991) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)).

> Where, as in this case, the Trial Court ruled on the issue . . . without holding an evidentiary hearing, dismissal is appropriate only if the plaintiff has not made a prima facie showing of personal jurisdiction.

Fields v. Sedgwick Assoc. Risks, Ltd., 796 F.2d 299, 301 (9th Cir. 1986). In reviewing the dismissal, the court must "review the facts in the light most favorable to the party opposing dismissal." *Access Road Builders v. Christenson Elec. Contracting Eng'g, Co.*, 19 Wn. App. 477, 481, 576 P.2d 71 (1978).

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[29]

3. Sheikh Mahfouz Deliberately Availed Himself of Washington State's Jurisdiction by Maintaining His Employment Relationship With Boeing's Seattle Headquarters.

a. Sheikh Mahfouz Subjected Himself to the Jurisdiction of Washington State Courts Because He Transacted Business in Washington.

Under RCW 4.28.185, "even a solitary business deal transacted in this state is sufficient to vest jurisdiction." *International Sales & Lease, Inc. v. Seven Bar Flying Serv., Inc.*, 12 Wn. App. 894, 898, 533 P.2d 445 [30] (1975). Sheikh Mahfouz's employment with Boeing constituted far more than a "solitary business deal" in Washington State.

From 1992 through 1997, Sheikh Mahfouz was employed by Boeing to provide services in connection with the Saudia sale. The contract of employment required Sheikh Mahfouz to visit Seattle for high-level conferences, correspond with Boeing officials in Seattle, provide representations and warranties to Boeing, take direction and follow instructions from Boeing, be subject to legal restrictions imposed by the U.S. government on Boeing, send agents to Washington State to assist Boeing, and execute on an annual basis a new written contract and in so doing agree to be bound by Washington law. Sheikh Mahfouz has benefited greatly from these Washington contacts. He will receive several hundred million dollars in commissions under the Agreements. The claims in this lawsuit arise from Sheikh Mahfouz's relationship with Boeing over this six-year period.

Contracts — including employment contract — between a nonresident and a Washington State business confer jurisdiction to a Washington court.[13] For example, in *Cofinco,* this Court reversed a Trial [31] Court's dismissal for lack of jurisdiction. This Court held that by "entering the employment contract," the defendant submitted to Washington's jurisdiction, even though he had "never been in the state . . . never owned property [here] and has never engaged in activities, business or otherwise, in this state." 25 Wn.App. at 197.

In *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) the Supreme Court reached the same conclusion as this Court in *Cofinco.* It held that where, as here, a defendant deliberately created "continuing obligations between himself and residents of the forum, . . . the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Burger King,* 471 U.S. at 474-76. *See also McGee v. International Life Ins. Co.,* 355 U.S. 220, 223, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957) ("[I]t is sufficient for purposes of due process that the suit was based on a contract which had a substantial connection with that State.").

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[13] *See Kysar,* 76 Wn. App. at 489-90 (court exercised jurisdiction over Massachusetts resident who ordered Christmas trees from Washington, though contacts were limited to "an exchange of forms, letters and phone calls between Washington and Massachusetts," and the contract contained a choice-of-law clause that Washington law would govern any disputes); *Sorb Oil Corp. v. Batalla Corp.,* 32 Wn. App. 296, 299, 647 P.2d 514 (1982) (nonresident defendant engaged in purposeful conduct by ordering by telephone products from Washington corporation that were shipped from Indiana, not Washington, to defendant); *Crown Controls, Inc. v. Smiley,* 47 Wn. App. 832, 836-39, 737 P.2d 709 (1987) (nonresident defendant's telephone orders sufficient to confer jurisdiction); *see also Roth,* 942 F.2d at 622 (nonresident defendant purposefully availed himself in California where checks owed under the agreement would have originated from the forum state and depended upon activities in the forum); *CompuServe Inc. v. Patterson,* 89 F.3d 1257, 1264 (6th Cir. 1996) (jurisdiction established solely on contacts through the Internet); *Pepsi-Cola Bottling Co. Inc. v. Buffalo Rock Co.,* 593 F. Supp. 1559, 1565 (N.D. Ala. 1984) ("[N]onresident's purposeful affiliation with a state for purposes of pecuniary gain has long been deemed a sufficient contact to render the nonresident subject to suit in the courts of that state . . . *even if the nonresident has no physical presence in the state whatsoever.*" (emphasis added)); *Burger King,* 471 U.S. at 478-79 (the entire business transaction, including "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing must be evaluated in determining whether the defendant purposefully established *minimal* contacts within the forum") (emphasis added).

* * *

[34]

b. Sheikh Mahfouz Subjected Himself to the Jurisdiction of Washington State's Courts Because He Transacted Business Through His Agent Bawazir.

Washington's long-arm statute explicitly subjects to the jurisdiction of Washington State courts any person "who in person or *through an agent*" transacts business in Washington. RCW 4.28.185 (emphasis added). *See also Chan v. Society Expeditions, Inc.,* 39 F.3d 1398, 1405-06 (9th Cir. 1994).

Sheikh Mahfouz's contacts with Boeing through his agent Bawazir were extensive and include having:

- Bawazir serve as the primary contact with Boeing officials and representatives;
- Bawazir make many visits to Seattle as part of his activities on behalf of Sheikh Mahfouz and Boeing;
- Bawazir meet and coordinate with senior Boeing management in Seattle by telephone for several hours each week; and

- Bawazir assist Boeing in the preparation of correspondence and communication to Saudi royal officials and Saudia management.

CP 677-78 ¶¶ 11-16.[17]

4. This Lawsuit Would Not Arise "But For" Sheikh Mahfouz's Agreements With Boeing.

Washington may assert jurisdiction over Sheikh Mahfouz because Bawazir's cause of action would not have arisen "but for" Sheikh [35] Mahfouz's Agreements with Boeing. *See Shute*, 113 Wn.2d at 772. The Washington Supreme Court has held that jurisdiction may be asserted, and the minimum due process requirement satisfied, if the "but for" test is met. *Id. See also Port Lynch, Inc. v. New England Int'l Surety of Am., Inc.*, No. C89-465Z, 1990 WL 167126 (W.D. Wash. May 23, 1990); *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995) (*Shute's* "but for" test followed in asserting jurisdiction).

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[17] *See Nakanishi v. Foster*, 64 Wn.2d 647, 659, 393 P.2d 635 (1964) (nonresident defendant who contracted with an agent "on a commission basis" to secure supplies in Washington subject to Washington's jurisdiction based on agent's activities in Washington); *Barer*, 20 Wn. App. at 481 (activities of nonresident defendant's manager in state "all that is necessary" to confer jurisdiction); *Bowen v. Bateman*, 76 Wn.2d 567, 576-77, 458 P.2d 269 (1969) (activities of nonresident defendant's partner in state sufficient to confer personal jurisdiction).

5. The Assumption of Jurisdiction Over Respondents Is Reasonable.

a. The Trial Court's Rulings Will Have a Detrimental Impact on International Trade in Washington State.

The U.S. Supreme Court recognized long ago that "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *McGee,* 355 U.S. at 223.

The Washington Supreme Court likewise has held that the long-arm statute recognizes:

> [A]s an economic fact of modern life that large segments of commerce . . . inevitably seek out a connection with or link to customers, consumers . . . or subcontractors in other states who intend or contemplate that the product, process or article of commerce . . . shall be used or employed in states other than the place of origin or beginning.
>
> . . .
>
> The connecting link then may consist of affirmative acts taking place here by which the out-of-state resident overtly submits to jurisdiction; . . . or the initiation of a transaction outside the state in contemplation that some phase of it will take place in the forum state. . . . The existence of these phenomena of modern economy are ordinarily enough to bring the parties within the long-arm statute without engendering an unjust or oppressive extension of jurisdiction.

Griffiths & Sprague Stevedoring Co. 71 Wn.2d at 684.[18]

The Trial Court's rulings are a giant step backwards from these "economic facts of modern life."

b. The Assumption of Jurisdiction Is Reasonable Because Sheikh Mahfouz Has Extensive Ongoing Activities in Washington.

Because the first two prongs under the due process test are satisfied, the burden has shifted to Sheikh Mahfouz to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King,* 471 U.S. at 476. But Sheikh Mahfouz provided no evidence that asserting jurisdiction over him is unreasonable.

Sheikh Mahfouz frequently travels to the United States and maintains residences here. CP 674-75 ¶¶2-3. He has substantial relationships with Boeing in Seattle and the Frank Russell Company in Tacoma. He owns several businesses in this state. CP 111 ¶¶6-8, Exs. 5-7 (CP 148, 151-55). He or his family owned a residence in the Seattle area. CP 675 ¶3. He owns at least two Boeing airplanes (a 757 and a 767), making travel convenient. CP 674 ¶2; App. A.

Defending this lawsuit in this forum will not amount to a "due process violation" or place Sheikh Mahfouz at

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[18] Nowhere should this be more apparent than our state, standing as we do at a major crossroads of international trade. "Washington is the most trade-oriented state in America, [and]... is home to the United States' largest exporter, the Boeing Company." *See Washington State Community, Trade & Economic Development* (<http://www.trade.wa.gov/whyis.htm>(Dec. 14, 1998)).

"a severe disadvantage in [37] comparison to his opponent." *See McGee,* 355 U.S. at 224. *Burger King,* 471 U.S. at 474.

* * *